University of Alberta

International Corporate Liability for Human Rights Violations

by

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This thesis is dedicated to

My parents

and to

my siblings - Val, Ben, Chuma and Nkoli for their love, prayers and support

ABSTRACT

Generally, corporations are not subjects of international law and are not answerable under international law for human rights violations. Does the victim's recourse exist only within the State of origin? If this is so, many human rights violations will not be redressed especially in the developing countries. The United States' *Alien Tort Claims Act* [*ATCA*] provided a basis for enforcing the violated rights. Essentially *ATCA* allows aliens (foreigners) to enforce a violated right in tort only, in the US courts even in instances where there is no protection in the alien's state. Despite frequent recourse to *ATCA*, litigants have not invoked it successfully. This thesis explores the issues of human rights violation and what recourse if any, that international law provides to victims. The thesis concludes on the note that international law will provide the most credible basis for seeking enforcement of the rights.

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INTERNATIONAL CORPORATE LIABILITY FOR HUMAN RIGHTS VIOLATIONS

OVERVIEW

Globalization[1] has been referred to as "one of the most pronounced phenomena of the last decades"[2] and transnational corporations facilitate globalization. Transnational corporations are "the primary vehicle for foreign direct investment [and have]… been widely recognized as a major player in this process, if not"[3] "[t]he primary agent of globalization".[4]

The importance of transnational corporations is emphasized in the assertions that "[t]he significant increase in international transactions has led to the establishment of multinational corporations as perhaps the most important actors in the world economy,"[5] and "[f]oreign direct investment by multinational enterprises has overtaken international trade as the most important force for global integration."[6] Multinationals exercise their influence and power through job creation[7] and the introduction of new technologies within their scope of operation.[8]

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[1] Globalization is described as "a broad array of social, political and economic developments such as the internationalization of production, the worldwide expansion of trade, the increased mobility of goods, capital and labour, the breathtaking advances in communication technology, and the emergence of new financial instruments". (Franz Blankart, "The World Trade Organization: First Achievements and Remaining Challenges After Singapore" (1997) 52 *Aussenwirtschaft* at 335) [*Blankart*]. Globalization has also been defined as the "integration of national economies into the international economy through trade, direct foreign investment (by corporations and multinationals), short-term capital flows, international flows of workers and humanity generally, and flows of technology." - Jagdish Bhagwati, *In Defense of Globalization* (Oxford: Oxford University Press, 2004) at 3.

[2] *Ibid* at 335.

[3] Cynthia Wallace, *The Multinational Enterprise and Legal Control – Host State Sovereignty in an Era of Economic Globalization* (The Hague: Kluwer Law International, 2001) at 1 [Wallace].

[4] Sylvia Ostry, "The Domestic Domain: The New International Policy Arena", in *United Nations Conference on Trade and Development,* Division on Transnational Corporations and Development, Companies without Borders: Transnational Corporations in the 1990s (New York: International Thomson Business Press, 1996) at 317.

[5] Daniela Levarda, "A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving a Uniform System of Extraterritorial Discovery" (1995) 18 Fordham International Law Journal at 1344.

[6] "Foreign Investment Surpasses Trade as Force for Global Integration" 3 *IPS Daily Journal,* (15 December 1995) at 5 (discussing UNCTAD report prepared by Karl Sauvant) cited by Wallace, *supra* note 3.

Multinational enterprises[9] are corporate entities, which facilitate economic globalization through business transactions that transcend political boundaries.[10] Multinationals are also artificial legal creations with "minimum access to legal processes transcending state lines – in the sense that they are authorized to make claims and be subjected to claims – which is the principal import of international legal personality."[11] This is because a multinational corporation, operating through its subsidiaries, is subject to the laws of each state, in which it transacts business.[12] Therefore, a multinational corporation "must accommodate itself in the conduct of its operations to many legal systems…"[13] This creates a problem because "the complexity of doing business simultaneously under a variety of differing legal frameworks poses its own particular difficulties for the centralized management, characteristic of multinational operations".[14]

Critics suggest that a multinational enterprise "is not in any real sense subject to any" legal system because "the enterprise as a composite unit – that is, in the sum of all its individual corporate parts - …does not come under the control of a single comprehensive external authority."[15] It is suggested that this anomaly has created a situation where multinational enterprises may "sometimes be tempted to take advantage of the complexity of political and legal systems to create a world of their own which must accommodate itself in the conduct of its operations to many legal systems but is not in any real sense subject to any of them".[16]

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[7] Scott Greathead, "The Multinationals and the New Stakeholder: Examining the Business Case for Human Rights" (2002) 35 Vand. J. Transnat'l L719 at 722.

[8] Thomas Donaldson, "Can Multinationals Stage a Universal Morality Play?" (2002) 29 Bus. & Soc. Rev. 52.

[9] Wallace defined multinational enterprise as "an aggregate of corporate entities, each having its own juridical identity and national origin, but each in some way interconnected by a system of centralized management and control, normally exercised from the seat of primary ownership. See Wallace, *supra* note 3. In this thesis, multinational enterprises will be used interchangeably with multinationals, transnational enterprise, transnational companies, transnational corporations, multinational corporations and multinational companies. Muchlinski stated that earlier United Nations terminology distinguished between "enterprises owned and controlled by entities or persons from one country but operating across national borders – the 'transnational' – and those owned and controlled by entites or persons from more than one country – the 'multinational'." In practice, this distintion has disappeared from UN reports and publications – See Peter Muchlinski, *Multinational Enterprises and the Law*, 2nd ed. (Oxford: Oxford University Press, 2007) 6.

[10] Wallace, *supra* note 3 at 9.

[11] Florentino Feliciano, "Legal Problems of Private International Business Enterprises: An Introduction to the International Law of Private Business Associations and Economic Development" (1968) III Recueil des Cours 118 at 448-449 also cited by Wallace, *supra* note 3 at 9-10.

[12] Wallace, *supra* note 3 at 11.

[13] *Ibid.*

[14] *Ibid.*

From the foregoing, host states bear a primary responsibility for the control of transnational corporations. This creates concerns, especially in developing countries where states may lack the will or the ability to control transnational corporations effectively. This may be due to visionless leadership,[17] corruption or ineffective legal systems.

Due to the ineffective legal systems in some host states, some corporations have tried to address human rights violations that may result from foreign direct investments through self-regulation.[18] Corporations engage in self-regulation through codes of conduct that address human rights, and other issues that enhance the global image of transnational corporations. Although self-regulation may be effective where corporations genuinely pursue the stated objectives, it is not an alternative to the international legal regulation of transnational corporations. This is because self-regulation involves voluntary measures drawn up by the corporation and do not bind the corporation *per se*.[19] Further, it is generally not subject to independent verification to ascertain whether successes attributed to such measures by corporations are real or imagined. In addition, it does not present a uniform standard since corporations focus on different issues regarding their code of conduct.

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[15] *Ibid.*

[16] Wolfgang Friedmann, Louis Henkin & Oliver Lissitzyn, eds., *Transnational Law in a Changing Society*, Essays in honor of Phillip C. Jessup (New York: Columbia University Press, 1972) at 80.

[17] Evaristus Oshionebo, *Enhancing Corporate Social Responsibility in Nigeria's Oil and Gas Producing Communities: A Contextual Analysis* (Faculty of Law, University of Alberta, Spring 2002) at 1.

[18] De Schutter argued that although transnational corporations had been referred to as "leviathans" and "hydra-headed monsters" due to human rights concerns that result from foreign direct investment [FDI], a developing country is in a worse position if it attracts no FDI. This is because FDI fosters economic growth and expansion of human capabilities. See Olivier de Schutter, "Transnational Corporations as Instruments of Human Development" in Philip Alston & Mary Robinson, ed., *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005) 403.

[19] *Contra* the United States Case of *Nike v. Kasky* 119 Cal. Rep. 2d 296 (2002). In that case, the California Supreme Court held that corporations are liable for false statements made to the public in relation to their workplace conduct. It has been argued that the utility of this judgment is diminished by the fact that corporations may decide to restrict what they state in their corporate codes, or "may even decide to say nothing and be hesitant about disclosing their policies and practices". See Emeka Duruigbo, *Multinational Corporations and International Law* (New York: Transnational Publishers, 2003) at 124 [Duruigbo]. See Mark Baker, "Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise" (2001) 20 Wis. Int'l L.J. 89 at 118. Baker argues that since there is no legal obligation on corporations to adopt corporate codes, corporations may counter a movement

In principle, self-regulation should not serve as an alternative to legal regulation.[20] The United Nations Office of the High Commissioner for Human Rights, commenting on the viability of self-regulation stated:[21]

> Company and market initiatives have their limits and are not necessarily comprehensive in their coverage nor a substitute for legislative action. Importantly, while voluntary business action in relation to human rights works for the well-intentioned and could effectively raise the standard of other companies, there remains scepticism amongst sectors of civil society as to their overall effectiveness.

Such scepticism led to various attempts to develop international standards regulating the activities of transnational corporations. Sadly, several such attempts failed, and international law is still grappling with the corporate liability of transnational corporations.

The failure of international law to develop standards regulating the activities of transnational corporations has led to the unavailability of remedies to victims of corporate violations of human rights. This has led in turn to the search for remedies in other jurisdictions especially the United States. In the United States, litigants generally rely on the *Alien Tort Claims Act*[22] to sue corporations in tort, for human rights violations that occurred outside the United States. Several countries including Canada do not have a statute similar to the *Alien Tort Claims Act*. Therefore, there is no enabling statute in Canada that expressly authorizes aliens to sue in tort for violations of international law.

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towards enforceability of corporate codes by either making the provisions of such codes so general that it practically eliminates civil liability or the corporations may dispense with corporate codes.

[20] Olivier De Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier De Schutter, ed., *Transnational Corporations and Human Rights* (Portland: Hart Publishing, 2006) 1 at 27 [De Schutter].

[21] United Nations, *Report of the High Commissioner on Human Rights on the Responsibility of Transnational Corporations and Related Business Enterprises with Regard to Human Rights* (15 February 2005), UN doc. E/CN.4/2005/91 at para 45 [OHCHR 2005 Report].

[22] 28 U.S.C. § 1350. The Alien Tort Claims Act is a single paragraph legislation which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"

The purpose of this thesis is to evaluate the international liability of transnational corporations particularly oil companies. For comparative reasons, it appraises access to remedies in the United States by alien victims of human rights violations. Aliens in this sense refer to non-citizens and non-residents of the United States.

It then contrasts the situation in Canada by assessing the extent of the extraterritorial jurisdiction of Canadian courts over torts involving human rights violations committed by Canadian transnational oil corporations. The analysis focuses on Talisman,[23] a Canadian transnational oil corporation, which allegedly committed human rights violations in Sudan and was later sued by the victims in the United States.

ORGANISATION

This thesis is divided into five chapters. Chapter One considers voluntary initiatives prescribed by governmental and non-governmental organizations as guiding principles for ethical corporations. It assesses the viability of self-regulation by corporations as an alternative to international legal regulation. It concludes that although voluntary initiatives including self-regulation are beneficial, they are not binding on corporations and international law has yet to create a legal regime regulating the activities of transnational corporations.

Chapter Two uses the *Alien Tort Claims Act* to analyze the assumption of jurisdiction by United States courts over transnational corporations for alleged human rights violations. It traces the basis for the assumption of jurisdiction by United States courts over alleged human rights violations by transnational corporations and points out that a plaintiff can only sue in tort. It also observes that alleged human rights violations involving transnational oil corporations usually involve aiding and abetting or complicity with the host state. It observes that these elements are difficult to prove in cases involving alleged human rights violations by transnational oil corporations. It concludes that a rigid application of *forum non conveniens* will diminish the utility of ATCA.[24]

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[23] Talisman is a Canadian oil corporation, which was allegedly involved in human rights violations in Sudan. The victims of the alleged human rights violations sued in the United States under the *Alien Tort Claims Act* for damages. This case will be discussed in Chapter Two.

Chapter Three assesses the jurisdiction of Canadian courts over transnational torts because a victim of human rights violations committed by a transnational oil corporation is likely to sue in tort for damages. The likely tort that such plaintiffs will rely on is conspiracy to commit human rights violations. Although the tort of conspiracy is established in Canada, conspiracy to commit human rights violations has not been recognized, but there are encouraging statements from Canadian courts suggesting that the door to the categories of the tort of conspiracy is not closed.

This thesis uses the facts of the Talisman case in the United States as a hypothetical scenario to analyze how a Canadian court might treat a similar claim. The alleged tort was not committed directly by Talisman but the allegations involved complicity with the Sudanese government, which may have been responsible for any torts committed. Talisman's operation in Sudan was through its subsidiary incorporated in Sudan. This work assesses the liability of Talisman for torts committed by its subsidiary and concludes that although a corporation may be liable for the torts of its subsidiary, Talisman will likely not be liable on the facts of the hypothetical scenario.

Chapter Four discusses the doctrine of *forum non conveniens*. It evaluates the likely considerations that may determine the assumption of jurisdiction by a Canadian court over the Talisman case and the possible grounds for declining jurisdiction. It concludes that although a Canadian court possesses personal jurisdiction over Talisman, the court may decline jurisdiction on the ground of *forum non conveniens* unless the plaintiffs convince the court that they will not get justice in Sudan.

Chapter Five acknowledges the usefulness of norms but cautions that while a legal regime is necessary, the scope of conspiracy should be defined carefully to ensure that any proposed legal regime for the regulation of transnational corporations does not result in weak or unenforceable laws. It recommends that the presence of an international legal regime may serve as the catalyst for the adoption and enactment of legislation in Canada to facilitate the exercise of jurisdiction by Canadian courts over transnational human rights violations. In the absence of these key developments, it is unlikely that our hypothetical plaintiff will have the right to sue Talisman in Canada.

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[24] *Forum non conveniens* means "that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place." - ***Black's Law Dictionary***, 8th ed., *s.v.* *"forum non conveniens."*

CHAPTER ONE

COMPETING MEANS OF REGULATION OF TRANSNATIONAL CORPORATONS - INTERNATIONAL LEGAL REGIME VERSUS VOLUNTARY INITIATIVES.

1.1 INTRODUCTION

Lauterpacht stated that "the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law".[25] The Statute of the International Court of Justice [ICJ] also adheres to the positivist view that only states are subjects of international law because the ICJ adjudicates disputes between states only.[26] Nevertheless, the ICJ also has jurisdiction to give advisory opinions on any legal question at the request of any body authorized by the Charter of the United Nations to make such request.[27] Pursuant to the Charter of the United Nations, the General Assembly, the Security Council, Specialized Agencies and Organs of the United Nations may request advisory opinions from the ICJ.[28] Based on a reference by the United Nations, the ICJ assumed jurisdiction by way of an advisory opinion over the *Reparation for Injuries Suffered in the Service of the United Nations* and stated that international personality and the capacity to bring claims at international law are not restricted to states only.[29]

Non-state entities such as insurgents and belligerents, the Holy See (especially from 1871-1929), chartered companies, the League of Cities and other territorial entities, international organizations and even individuals have at some point been treated as having the capacity to become legal persons under international law.[30] The question is whether transnational corporations are subjects of international law. Ian

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[25] Hersch Lauterpacht, *International Law* (1937) 489 [Lauterpacht]. See also Malcolm Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 177 [Shaw].

[26] See Articles 34-35, Statute of the International Court of Justice. See also Article 93 of the *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7.

[27] Statute of the International Court of Justice, art. 65(1).

[28] United Nations Charter, art. 96.

[29] [1949] I.C.J. Rep. 174.

[30] See Lauterpacht, *supra* note 25 at 494-500; *Shaw, supra* note 24 at 177. See also Memorandum of the United Nations Secretary, *General Survey of International Law in Relation to the Work of Codification of the International Law Commission*, 1949, A/CN.4/1/Rev.1, at 24; the *Western Sahara Case,* [1975] I.C.J. Rep. 12 at 39. On the capacity of individuals in international law, see David Harris, *Cases and Materials on International Law*, 6th ed. (London: Sweet & Maxwell, 2004) at 140-144 [Harris].

Brownlie classified transnational corporations as controversial candidates for international personality and observed that in principle, they do not have international personality.[31] However, he pointed out that jurists have argued that transnational corporations manifest aspects of international personality and should be treated as possessing same because transnational corporations enter into contracts including concession agreements with foreign governments. Malcolm Shaw observes that transnational corporations are possible candidates for international personality and concludes that "the question of the international personality of transnational corporations remains an open one."[32] One can only conclude that the international community has not fully accepted the international personality of transnational corporations. Nevertheless, transnational corporations possess some qualities of international personality.

This chapter considers whether corporations are liable under international law for human rights violations. It also assesses the viability of an international legal regime and voluntary initiatives as alternative means of regulation of transnational corporations.

1.2 INTERNATIONAL LEGAL REGIME REGULATING THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS

The development of an international legal regime regulating the activities of transnational corporations has so far been problematic.[33] The debate on the regulation of transnational corporations has continued since 1974, when the United Nations recognized the New International Economic Order.[34] Developing countries pushed for the legal regulation of transnational corporations to ensure that such corporations would not interfere with their economic objectives or political independence.[35]

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[31] Ian Brownlie, *Principles of Public International Law*, 6th ed. (New York: Oxford University Press, 2003) at 65.
[32] Shaw, *supra* note 25 at 224-5.
[33] See Surya Deva, "UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?" (2004) 10 ILSA Journal of Int'l & Comparative L., pp. 493-523.
[34] UN doc A/Res/3201 (S-VI) 1 May 1974. See also the preamble to *Universal Declaration of Human Rights* which enjoins individuals and "every organ of society" [which arguably includes transnational corporations] to respect human rights - GA Res. 217(III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

It was more than a decade later, in 1988, when the United Nations Commission on Transnational Corporations prepared a draft Code of Conduct outlining the responsibility of transnational corporations.[36] The Draft Code required transnational corporations to respect human rights and fundamental freedoms in countries where they operate. Due to disagreements between developed and developing states, the United Nations did not adopt the Draft Code. An attempt to redraft the Code was abandoned in 1993.[37]

The former United Nations Secretary General, Kofi Anan, revived the debate on international responsibility of transnational corporations when he proposed the Global Compact at the 1999 World Economic Forum. The *Global Compact* is a voluntary initiative on corporate responsibility, which encompasses human rights, labour and environmental rights, and anti-corruption.[38] The *Global Compact* is similar in content to the *Organization for Economic Co-operation and Development Guidelines* [*OECD Guidelines*][39] although its principles[40] derive largely from the *Universal Declaration of*

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[35] See De Schutter, *supra* note 20 at 3.

[36] UN Draft Code of Conduct on Transnational Corporations, UN ESCOR, Org Sess., Provisional Agenda Item 2, UN Doc. E/39/Add. 1 (1988) at 11. See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report by the Secretary General, *The Impact of the Activities and Working Methods of Transnational Corporations on the Full Enjoyment of All Human Rights, In Particular Economic, Social and Cultural and the Right to Development, Bearing in Mind Existing Guidelines, Rules and Standards Relating to the Subject-Matter,* UN doc E/CN.4/Sub.2/1996/12, 2 July 1996, paras 61-62. See also De Schutter, *supra* note 20 at 2.

[37] See Robert Fowler, "International Environmental Standards for Transnational Corporations" (1995) 25 Envtl. L.J. at 3.

[38] See the *UN Global Compact* Initiative online: http://www.unglobalcompact.org/AboutTheGC/index.html. Over 5000 companies across the globe are now signatories to the Global Compact but the transnational companies are opposed to a transformation of the principles from norm to law.

[39] See General Policies online: <http://www.olis.oecd.org/olis/2000doc.nsf/4f7adc214b91a685c12569fa005d0ee7/c125692700623b74c1256991003b5147/$FILE/00085743.Doc>.

[40] See the Ten Principles online: http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html. The ten principles are: (1) Businesses should support and respect the protection of internationally proclaimed human rights. (2) Businesses should make sure that they are not complicit in human rights abuses. (3) Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining. (4) Businesses should support the elimination of all forms of forced and compulsory labor. (5) Businesses should support the effective abolition of child labor. (6) Businesses should support the elimination of discrimination in respect of employment and occupation. (7) Businesses should support a precautionary approach to environmental challenges. (8) Businesses should undertake initiatives to promote greater

Human Rights,[41] the *International Labour Organization's Declaration on Fundamental Principles and Right at Work*,[42] the *Rio Declaration on Environment and Development*,[43] and the *UN Convention against Corruption*.[44]

The Global Compact aims to guard against complicity in human rights violations, which may be direct,[45] beneficial,[46] or silent.[47] Corporations acceding to the Global Compact "should support and respect the protection of internationally proclaimed human rights" and ensure that "they are not complicit in human rights abuses."[48] The *Global Compact* requires corporations to "embrace, support and enact within their sphere of influence" the ten principles of the *Global Compact* and report annually on efforts made by the corporation to implement those ten principles.[49] *Global Compact* did not explain the meaning of "sphere of influence." De Schutter opines that "sphere of influence" implies that the human rights responsibilities of a corporation depend on the scope of impact of its corporate activities and its ability or capacity to influence its corporate partners or other actors with whom the corporation interacts.[50]

Due to the voluntary nature of the *Global Compact*, there are no sanctions on corporations, for non-compliance with the ten principles. Corporations may be

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environmental responsibility. (9) Businesses should encourage the development and diffusion of environmentally friendly technologies. (10) Businesses should work against all forms of corruption, including extortion and bribery.

[41] GA Res. 217(III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

[42] ILO website online: http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT

[43] 14 June 1992, U.N. Doc. A/CONF. 151/26/Rev.1 (Vol. 1) at 3-8; reprinted in 31 I.L.M. 874 (1992).

[44] 31 October 2003, 58 U.N.T.S. 4 (entered into force 14 December 2005).

[45] Direct complicity occurs where a company knowingly assists a state in committing human rights violations.

[46] Beneficial complicity arises where a company benefits directly from human rights violation committed by someone else.

[47] Silent complicity is failure by a company to raise systematic or continuous human rights violations committed by the authorities in the country where the corporation transacts business. For a definition of the different kinds of complicity, see Principle 2 online: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle2.html>.

[48] *Supra* note 40, Principles 1-2.

[49] *Ibid.*

[50] De Schutter, *supra* note 20 at 16. See also Urs Gasser, "Responsibility for Human Rights Violations, Acts or Omissions, within the 'Sphere of Influence' of Companies" online: <http://ssrn.com/abstract=1077649>.

signatories to the *Global Compact*.[51] Corporations subscribing to the *Global Compact* should state their support for the initiative, and include in their annual reports and other public documents, their corporations' progress towards internalizing the principles stated in the *Global Compact*.[52] Signatory corporations must submit within two years, brief reports of compliance [the Reports] to the Global Compact Website. The Reports are submitted subsequently every two years and failure to comply leads to the striking out of the name of the defaulting corporation from the list of participating corporations. The essence of the *Global Compact* as observed in its promotional brochure by Kofi Annan is "[T]o unite the power of markets with the authority of universal ideals…and to reconcile the creative forces of private entrepreneurship with the needs of the disadvantaged and the requirements of future generations."[53] Over 5,000 corporate signatories from more than 120 countries participate in the *Global Compact*.[54]

Reporting and other checks and balances put in place by the Global Compact ensure that participating corporations do not turn the initiative into a public relations exercise. Through reporting, the Global Compact indirectly serves the purpose of certification or endorsement of corporate responsibility. This is achieved through the bi-annual submission of reports of compliance. This fulfils the objective of the initiative by ensuring that only ethical corporations are members of the *Global Compact*.

In 2003, the United Nations approved the draft *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights* [the Norm].[55] The Norm embodies the human, environmental and social responsibilities of business enterprises, and incorporates existing international documents[56] such as the *Universal Declaration of Human Rights*[57] the *Millennium Declaration*[58] and the *Stockholm Declaration of the United Nations Conference on the Human Environment*[59]. These international documents outline principles on environmental protection and, essentially, seek to promote the observance of human rights and freedoms.

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[51] *Ibid.*

[52] Oliver Williams, "The UN Global Compact: The Challenge and the Promise" (2004) 14 (Issue 4) Business Ethics Quarterly 755 at 756.

[53] *Ibid.* at 757.

[54] United Nations Global Compact, "Participation in the Global Compact: Implementing the Principles" online: The Global Compact website <http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html>.

[55] UN Sub-Commission for the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, 2003, CN.4/2003, Sub2/ UN Doc. E/2003/12/Rev.2 (2003) [*the Norm*].

The Norm and the documents that it incorporates are soft laws. Though soft laws shape international opinion and frequently modify international conduct, they are not legally binding.[60] This distinguishes soft laws from treaties.[61] Soft laws are non-binding instruments or documents, or non-binding provisions in treaties.[62]

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[56] See Shell Leads International Business Campaign against UN Human Rights Norms online: <http://www.corporateeurope.org/norms.pdf>.

[57] See GA Res. 217 (III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71. The preamble enjoins member states and every organ of the society (which includes corporations and transnational companies) to promote and ensure the observance of human rights and fundamental freedoms.

[58] GA Res. A/Res/55/2, 8 Sept. 2000 online: <http://www.un.org/millennium/declaration/ares552e.htm>. See art. 21-23.

[59] U.N. Doc.A/Conf.48/14 online: http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503. See specifically Principle 22, which enjoined states to cooperate and develop international law regarding liability and compensation for victims of pollution and other environmental damage caused by activities within their jurisdiction or control and to areas beyond their control.

[60] Antonio Cassese, *International Law*, 2d ed. (Oxford: Oxford University Press, 2005) at 491 [Cassese]. See also Maurice Sunkin, David Ong, & Robert Wight, ed., *Sourcebook on Environmental Law*, 2d ed. (London: Cavendish Publishing, 2002) at 5 [Sunkin *et al*].

[61] A treaty is "an agreement between states, political in nature, even though it may contain provisions of a legislative character which may pass into law, produces binding effects between the parties to it." – *The Dictionary of Canadian Law*, 3d ed., *s.v.* "treaty". *Black's Law Dictionary* defined treaty as "an agreement formally signed, ratified, or adhered to between two nations or sovereigns: an international agreement concluded between two or more states in written form and governed by international law." – *Black's Law Dictionary*, 8th ed., *s.v.* "treaty" [*Black's Law Dictionary*]. Art. 2 of the 1969 Vienna Convention on the Law of Treaties defined a treaty as "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

[62] A.E. Boyle, "Some Reflections on the Relationship of Treaties and Soft Law" (1999) 48 I.C.L.Q. 901, D. Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, (Oxford: Oxford University Press, 2000), J. Gold, "Strengthening the Soft International Law of Exchange Arrangements" (1983) 77 A.J.I.L. 77 at 443, (1988) P.A.S.I.L. 371. See also Shaw, *supra* note 25 at 110 – 111. *Black's Law Dictionary* defined soft law as "Collectively, rules that are neither strictly binding nor completely lacking in legal significance. [In] International Law, [they are] guidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding." Soft laws are "enunciated in the form of inter-governmental declarations which are codified but without the usual signature and ratification process to confirm the consent of states as in a treaty." – Sunkin *et al*, *supra* note 60 at 5.

The preamble to the Norm states as follows:[63]

> States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights. Transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights…[and] their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in the United Nations treaties and other international instruments.

The preamble to the Norm [the Preamble] recognizes that states bear the primary obligation to promote and enforce human rights. The Norm also relies on the preamble to the *Universal Declaration of Human Rights*, which obliges "every organ of society" among others, to respect human rights. The Preamble then identifies transnational corporations as organs of society and imposes an obligation on them to promote and secure human rights contained in the *Universal Declaration of Human Rights*.

The Commentary to the Norm explaines further:[64]

> Transnational corporations and other business enterprises shall have the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware. Transnational corporations and other business enterprises shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights. Transnational corporations and other business enterprises shall inform themselves of the human rights impact of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses.

The Commentary shows that the Norm sets out to regulate not only direct human rights abuses, but also complicity in human rights violations by corporations. Complicity in human rights violations is an idea seemingly copied from the *Global Compact*.[65] De Schutter argues that no international law regulation of the liability of transnational corporations "will be workable" until the idea of complicity is "adequately clarified."[66] The Office of the High Commissioner for Human Rights in its 2005 Report [the 2005 Report] identified four kinds of complicity:[67]

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[63] *The Norm, supra* note 55, Preamble, 3d and 4th recital.

[64] *Supra* note 55.

[65] *Supra* note 40, Principle 2. See also notes 45-47.

> First, when the company actively assists, directly or indirectly, in human rights violations committed by others; second, when the company is in a partnership with a Government and could reasonably foresee, or subsequently obtains knowledge, that the Government is likely to commit abuses in carrying out the agreement; third, when the company benefits from human rights violations even if it does not positively assist or cause them; and fourth, when the company is silent or inactive in the face of violations.

The 2005 Report also identified objections raised by stakeholders against the Norm.[68] Some of the objections are that states alone bear the responsibility to promote and enforce human rights. Therefore, obligations created by the Norm, seeking to apply the same standards to corporations are a misstatement of international law and shift the responsibility of states to transnational corporations. Another objection by stakeholders is that there is no indication that voluntary initiatives aimed at regulating transnational corporations have been inadequate. Although voluntary initiatives are undeniably beneficial since they permit corporations to exercise positive influence within their sphere of influence, they do not provide remedies for violation of rights of aggrieved persons by errant corporations.

The stakeholders also argued that the Norm derives from international instruments of varying legal status and levels of ratification. Further, some provisions of the Norm are vague, reporting is burdensome and adjudication may be difficult.[69]

Adjudication is a problem under the Norm because it enjoins states to create the "necessary legal and administrative framework" to ensure the implementation of the Norm and other relevant national and international laws.[70] Such a legal and administrative framework is generally ineffective in developing countries and the mere assertion by the Norm that they should be created without guidance and clarification on the extent of the required framework may undermine the effectiveness of the Norm. The Norm also requires each corporation to compensate promptly and rehabilitate persons, communities and entities that are adversely affected by the corporation's non-compliance with the provisions of the Norm.[71] While determining damages or criminal sanctions attributable to a corporation, national courts and international tribunals should apply the Norm, in accordance with national and international laws.[72] Since the Norm is still soft law and not customary international law, this adjudication provision is not legally binding. Courts may look at the document and even apply its provisions because it expresses international concerns and prescribes standards for corporate responsibility. Such standards are not legally binding but they constitute prescriptions of international values for a problem with international dimension. Therefore, the provisions are persuasive.

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[66] *De Schtter, supra* note 20 at 13.

[67] See United Nations High Commission on Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights* 15 February 2005, CN.4/2005, UN Doc. E/2005/91 at para 34.

[68] *Ibid.*

[69] *Ibid.*

[70] *Supra* note 55, Principle 17.

Due to criticisms of the Norm, the United Nations Commission on Human Rights requested the United Nations Secretary General to appoint a Special Representative whose terms of reference would be:[73]

1. To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
2. To elaborate on the role of states in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
3. To research and clarify the implications for transnational corporations and other business enterprises of concepts such as 'complicity' and 'sphere of influence';
4. To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
5. To compile a compendium of best practices of States and transnational corporations and other business enterprises.

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[71] *Ibid.* Principle 18.

[72] *Ibid.*

[73] UN Commission on Human Rights, Human Rights and Transnational Corporations and other Business Enterprises, UNHCR Res. 2005/69, UNHCROR, 2005, cap XVII, E/CN.4/2005/L.10/Add. 17 (2005). The United Nations Secretary General appointed John G. Ruggie as the Special Representative for Business and Human Rights. John G. Ruggie is Kirkpatrick Professor of International Affairs and Director, Mossavar-Rahmani Center for Business and Government, John F. Kennedy School of Government, Harvard University; and Affiliated Professor in International Legal Studies, Harvard Law School.

The United Nations Special Representative, Professor John Ruggie, recently presented his report [Ruggie Report] to the United Nations Human Rights Council.[74] The Ruggie Report conceptualizes and formulates three policy frameworks for consideration by the United Nations Human Rights Council.[75] These are the duty of the state to protect, which is the cornerstone of international human rights regime, "corporate responsibility to respect" which is a basic societal expectation of businesses, and access to remedies, because it is impossible to prevent all corporate abuse of human rights.[76] It identifies the need for governments to promote, at home and abroad, corporate respect for human rights and an appraisal of human rights impact before signing investment treaties and trade agreements.[77] In addition to the obligation on businesses to comply with applicable laws, corporations are "subject to…a social license to operate" which is determined by societal expectations and has been recognized in voluntary initiatives and soft law instruments.[78]

The Ruggie Report identifies the need for a due diligence process to enable a corporation determine whether it complies with human rights standards and the need for an outline "to manage the risk of human rights harm with a view to avoiding it."[79] Due diligence should consider three factors. First, it should assess the peculiarities of the country, which helps to highlight "specific human rights challenges" which a business activity may pose.[80] Second, the corporation should assess the human rights impact of its business activities.[81] Corporations should also develop monitoring and auditing processes in order to track on-going developments.[82] Third, the corporation should assess the implications of its relationships, such as the likelihood of an alliance with the state, its agencies or non-state business partners that may contribute to human rights abuses.[83]

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[74] John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* online: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> [Ruggie Report].

[75] Presentation *of Report to United Nations Human Rights Council* online: <http://www.business-humanrights.org/Documents/Ruggie-Human-Rights-Council-3-Jun-2008.pdf>.

[76] *Ibid.* at 3.

[77] *Ibid.* at 4.

[78] *Ibid.*

[79] *Ibid.*

[80] Ruggie Report, *supra* note 74 at 17.

[81] *Ibid.*

[82] *Ibid.* at 18.

Corporate alliances with the state raise the issues of aiding and abetting and corporate complicity in human rights violations. This has been the dominant issue in many cases in the United States involving alleged human rights violations by transnational corporations, especially oil companies.[84] The Ruggie Report identified legal and non-legal "pedigrees" as the two forms of corporate complicity.[85] The legal meaning of complicity is evident in the area of aiding and abetting international crimes for instance, "knowingly providing practical assistance or encouragement that has substantial effect on the commission of a crime…"[86] Non-legal corporate complicity involves "the indirect violation of the broad spectrum of human rights" and such violation may be political, civil, economic, social or cultural.[87] A corporation's mere presence in a country, silence or deriving benefit from human rights violations may not establish legal liability in the absence of practical assistance but corporations should realize that non-legal complicity may lead to reputational risk or even divestment by public and private investors.[88]

The Ruggie Report also opined that states should strengthen the capacity to "hear complaints and enforce remedies" against corporations and identified the need to address barriers that hinder access to justice including the ability of a foreign plaintiff to sue.[89] This issue is fundamental but the Ruggie Report did not state how the United Nations Human Rights Council [the Council] should handle it. Whatever route the

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[83] *Ibid.*

[84] For a discussion on United States cases involving alleged corporate complicity with the state to commit human rights violations, see Chapter Two of this thesis.

[85] Ruggie Report, *supra* note 74 at 20.

[86] *Ibid.*

[87] *Ibid.* at 21.

[88] The Norwegian Government on Ethics for the Government Pension Fund recommended in 2006, the divestment of Norwegian Pension Fund from companies, and later divested its pension funds from corporations, including Wal-Mart, for complicity in human rights violations. See Council on Ethics for the Government Pension Fund, Annual Reports 2006 and 2007, online: <http://www.regjeringen.no/en/sub/Styrer-rad- utvalg/ethics_council/annualreports.html?id=458699>. There was also outrage and demand for the divestment of York University's $7.4 million Pension Fund investment in Talisman Energy. This is because of the alleged complicity in human rights violations by Talisman Energy in Sudan. York University threatened divestment but Talisman subsequently pulled out of Sudan. See Angela Pacienza, "York University is Heard from on Divestment from Talisman Energy" online: <http://mathaba.net/sudan/data/york.htm>.

[89] Ruggie Report, *supra* note 74 at 23.

Council takes, the position of states on this issue will determine whether extra-territorial jurisdiction stands any chance of success. While the idea is laudable, it may be difficult to convince some states that they should assume jurisdiction over acts that occurred outside the state. The reason is that the suggestion is contrary to the doctrine of *forum non conveniens*[90] which is well entrenched in many jurisdictions. *Forum non conveniens* will be discussed in Chapter Four.

The Ruggie Report clarified that "sphere of influence" implies the influence of a company over the actual human rights violators and the impact of the company's activities or relationships on human rights.[91] The Ruggie Report cautioned that it is unwise to expect corporations to act whenever they have influence especially when governments are involved. What emerges is that the term "sphere of influence" is so wide that the law cannot possibly contemplate that a corporation should always act whenever it possesses influence. Although moral philosophy or even society may nurture such expectations, a practical approach suggests that the concept should be restricted to the social rather than the legal responsibility of corporations.

The next stage is for the Council to provide specific content to the recommendations contained in the Ruggie Report.[92] The United Nations Special Representative has expressed a willingness to work further on providing content to the recommendations contained in the Ruggie Report.

As the international community grapples with the regulation of transnational corporations, what emerges is that corporations are not directly liable under international law for violations of human rights resulting from their operations and activities.[93] At best, corporations are morally and socially obliged, in the same manner as other members of the international community to respect the universal rights enshrined in the Universal Declaration of Human Rights.[94]

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[90] *Forum non conveniens* means "that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place."

[91] Ruggie Report, *supra* note 74 at 19.

[92] John Ruggie, *Statement to United Nations Human Rights Council Mandate Review* online: <http://www.reports-and-materials.org/Ruggie-statement-mandate-review-5-Jun-2008.doc>.

[93] Georgette Gagnon, Audrey Macklin & Penelope Simons, "Deconstructing Engagement" (January 2003). U of Toronto, Public Law Research Paper No. 04-07, available at SSRN online: http://ssrn.com/abstract=557002 at 53 [Gagnon, Macklin & Simons].

Although the Norm is not legally binding, corporations should not view it as just another exercise. Imploring national courts and international tribunals to apply the Norm, in accordance with national and international laws, while determining damages or criminal sanctions attributable to a corporation, signals the future role of the Norm. It creates an endorsement for its application in national courts and impresses on judges that the Norm embodies acceptable global standards. It is not law but it facilitates the interpretation of national laws. In essence, this provision creates the possibility of indirect application of the Norm in national courts. This is a useful first step while the international community articulates the legal regulation of transnational corporations.

The next section appraises voluntary initiatives as soft laws, just like the Norm. It evaluates prescribed guidelines for transnational corporations based on voluntary initiatives and concludes on the manner in which soft laws generally have an impact on intractable international problems.

1.3 VOLUNTARY INITIATIVES AND SELF-REGULATION BY TRANSNATIONAL CORPORATIONS

Due to the absence of international liability on the part of transnational corporations, non-governmental organizations, governments and corporations have developed a number of voluntary initiatives aimed at controlling their activities.[95] Voluntary initiatives are flexible and a softer approach than the legal regulation of corporate conduct.[96] These initiatives incorporate standards adopted voluntarily by corporations.

Among the benefits of voluntary initiatives is that they do not approach corporate control from the perspective of "one size fits all", which is one of the shortcomings of legal control.[97] This creates flexibility and may foster corporate commitment whereas legal regulation may lead to avoidance strategies.[98]

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[94] Andrew Clapham & Scott Jerbi, "Categories of Corporate Complicity in Human Rights Abuses" (2001) 24. Hastings Int'l & Comp. L. Rev 339 at 340. See also Gagnon, Macklin & Simons, *ibid.* at 54.

[95] Gagnon, Macklin & Simons, *supra* note 93 at 75.

[96] *Ibid.*

Voluntary initiatives also have their limits. For instance, they may not be comprehensive in coverage of human rights issues.[99] They are not legally enforceable.[100] Critics are also quick to point out that the overall effectiveness of voluntary principles is doubtful.[101] While these are genuine concerns, the international community may not necessarily benefit from the implementation of a legal regime regulating the activities of transnational corporation. The reason is that states should generally agree to any proposed legal regulation of corporations in order to foster implementation,[102] effectiveness[103] and compliance[104] with any proposed international legislation. While the international community searches for legal solutions to corporate violations of human rights, voluntary initiatives present useful guidelines on societal and governmental expectations on corporate responsibility. Governmental, non-governmental and corporate involvement in the preparation of voluntary codes underscores the recognition that uniform guidelines for corporations are essential. The usefulness of voluntary initiatives is apparent because, where voluntary initiatives precede legal regulation, they influence regulatory policy by contributing to its scope and timing.[105]

Another form of voluntary initiative is self-regulation by corporations through the adoption of a corporate code of conduct.[106] Under this model, each corporation develops its corporate code and focuses on areas that the corporation intends to address to enhance its image or appeal to the community.[107] Corporations, especially those in the extractive industry, focus on human rights in their corporate code. Corporations publish in annual reports, the company's compliance with standards set out in the corporate code. Although such claims by corporations are usually not binding, they are grounds for criticism by non-governmental organizations where they conduct independent verification and discover inaccurate statements.

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[97] De Schutter, *supra* note 20 at 27.
[98] *Ibid.*
[99] OHCHR 2005 Report, *supra* note 21.
[100] *Ibid.*
[101] *Ibid.*
[102] Implementation refers to the incorporation or transformation of treaty obligations into national or state laws. See David Victor, Kal Raustiala & Eugene Skolnikoff, eds., *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Austria & Cambridge: International Institute for Applied Systems Analysis & the MIT Press, 1998) at 4.
[103] Effectiveness is the degree to which an "accord causes changes in behavior of targets that further the goals of the accord". See Kal Raustiala, "Compliance & Effectiveness in International Regulatory Cooperation" (2000) 32 Case W. Res. J. Int'l L. 387 at 394.
[104] Compliance examines a state's behavior against obligations assumed by the state – *Ibid.* at 391.
[105] John Moffet & Francois Bregha, "Responsible Care: A Case Study of a Voluntary Initiative" paper prepared for the Industry Canada, Treasury Board Voluntary Codes Project, June 1996. See also Anthony Fleming, "Reconciling the Use of Incentives to Motivate 'Voluntary' Compliace" (1999) 29 C.E.L.R. (N.S.) 146.
[106] Duruigbo, *supra* note 19 at 123.

An appraisal of the utility of voluntary codes involves a balancing of the likely harm presented by excessive legal regulation and the likely adverse effects created by unmonitored but harmful business practices. Objectively pursued voluntary initiatives may be more effective in countries with weak enforcement mechanisms.[108] They also serve as a catalyst for law reform and a basis for articulating a more effective legal regime. This usually applies where voluntary initiatives precede corporate regulation. However, the failure of voluntary initiatives can lead to a clamour for legal regulation.

On the other hand, legal regulation articulates ascertainable standards for corporate liability. It identifies sanctions for breach of stipulated duties and sets out standards for measuring compliance. Legal regulation therefore impresses on corporations that human rights are not a voluntary concept.

Although flexibility is one of the advantages of voluntary initiatives, it is also a disadvantage because it leads to substantial variation in the content of corporate codes and their voluntary nature has created a situation where "corporate developed codes deal very minimally with the issue of human rights abuses." [109]

There are a number of voluntary initiatives aimed at fostering corporate social responsibility.[110] One of such voluntary initiatives is the *Guidelines for Multinational*

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[107] *Ibid.*

[108] *Ibid.*

[109] Gagnon, Macklin & Simons, *supra* note 93 at 75. For a discussion on the study of corporate codes of North American corporations, see Craig Forcese, *Commerce with a Conscience? Human Rights and Corporate Codes of Conduct* (International Centre for Human Rights and Democratic Development 1997).

[110] There is no consensus on the definition of corporate social responsibility [CSR]. Nevertheless, CSR has been defined as the "concept whereby companies integrate social and environmental concerns into their business operations and in their interaction with their stakeholders on a voluntary basis." – See European Commission Green Paper, "Promoting a European Framework for Corporate Social Responsibility" (2001) COM 336 online: < http://ec.europa.eu/enterprise/csr/index_en.htm>.

Enterprises launched in 1976 by the Organization for Economic Co-operation and Development.[111]

Member countries adopted the *OECD Declaration on International Investment and Multinational Enterprises* [*OECD Declaration*] on June 21, 1976. The *OECD* revised its Declarations in 1979, 1984, 1991 and 2000 and the Declarations contain Guidelines for multinational corporations.[112] The latest version, adopted in 2000, incorporated respect for human rights on a voluntary basis with a view to achieving sustainable development.[113]

The basis for the *OECD Declaration* is to foster a commitment towards improving the investment climate, to encourage positive contributions by multinational enterprises towards economic and social progress and to minimize or resolve difficulties arising from the operations of transnational corporations.[114] Specifically, the *OECD Declaration* provides that multinational enterprises should "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."[115] It also recommends that corporations should disclose information on risk management, environmental, social and ethical policies. With respect to implementation, the OECD obliges member countries to set up National Contact Points. The National Contact Points [NCP] should hold annual meetings, reflect on compliance by corporations and report to the Committee on International Investment and Multinational Enterprises (CIME). The NCP provides an effective opportunity for the OECD to track the level of compliance by multinational enterprises. Though there are no sanctions, a negative report by the NCP on a corporation may lead to serious criticisms by non-governmental organizations and attract negative public opinion. This will generate negative publicity for a corporation.

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[111] The OECD was founded in 1961 and has a membership of about thirty countries drawn primarily from the developed states. Its professed objectives are commitment to democratic government, market economy and good governance in the public service and corporate activity, among others. See About OECD online: <http://www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1_1,00.html>.

[112] See Text of the *OECD Declaration on International Investment and Multinational Enterprises* online: http://www.oecd.org/document/53/0,2340,en_2649_201185_1933109_1_1_1_1,00.html. In fact, paragraph 1 of the OECD Declaration on International Investment and Multinational Enterprises, 1976 limited its application to multinational enterprises operating in the territories of OECD member states. This appears not to apply to the current 2000 Declaration.

[113] See General Policies online: http://www.olis.oecd.org/olis/2000doc.nsf/4f7adc214b91a685c12569fa005d0ee7/c125692700623b74c1256991003b5147/$FILE/00085743.Doc.

[114] See the Directorate for Financial and Enterprise Affairs, "OECD Declaration and Decisions on International Investment and Multinational Enterprises" online: <http:://www.oecd.org/document/24/0,3343,en_2649_34887_1875736_1_1_1_1,00.html>.

[115] *Ibid.*

The CIME oversees the general implementation of the *OECD Declaration*. The *Commentaries and Clarifications on the Declarations* emphasize that the "Guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the Guidelines by enterprises is voluntary and not legally enforceable."[116]

Another voluntary initiative is the *International Labour Organization* [*ILO*] *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* [*ILO Tripartite Declaration*].[117] The *ILO Tripartite Declaration* is a set of principles and guidelines for multinational enterprises and it covers areas such as industrial relations, employment, working conditions, training and human rights.[118]

The basis for the initiative, as stated in its preamble, is that "the ILO, with its unique tripartite structure, its competence and its long-standing experience in the social field, has an essential role to play in evolving principles for the guidance of governments…and multinational enterprises."[119] The aim of the *ILO Tripartite Declaration* is "to encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise, taking into account the United Nations resolutions advocating the establishment of a New International Economic Order."[120]

Among the general policies of the *ILO Tripartite Declaration* is the obligation to respect human rights.[121] Specifically, "the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards. They should respect the Universal Declaration of Human Rights and the corresponding

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[116] *Ibid.*

[117] The Governing Body of the International Labour Organization adopted the Tripartite Declaration in Geneva, at its 204th session in November 1977 and revised it at its 279th session in November 2000.

[118] Multinational Enterprises and Social Policy online: International Labour Organization <http://www.ilo.org/public/english/employment/multi/index.htm>.

[119] *Ibid.* Preamble.

[120] *Ibid.* Principle 2.

[121] *Ibid.* Principle 8.

International Covenants adopted by the General Assembly of the United Nations…"[122] The obligations under the *ILO Tripartite Declaration* are directed at governments of "state members of ILO" and multinational enterprises.[123] Multinational enterprises may observe the declarations on a voluntary basis.[124]

Although these voluntary initiatives are not binding, they contain useful guidelines to corporations that genuinely intend to uphold human rights. They also constitute soft laws.

Soft laws are non-binding instruments or documents, or non-binding provisions in treaties.[125] They shape international opinion.[126] As such, states are morally obliged, not legally enjoined to incorporate them into their domestic laws. Soft laws "lay down standards of action" for states, international organizations and corporations.[127] They "evince the consensus of the international community" on the path to be taken to tackle international issues.[128] Although they are not legally binding, "they are much more than simple desiderata of individual states or organizations" and they point to the general approach that states, intergovernmental organizations, national or multinational corporations should adopt, each at its own level.[129] Sarah Percy argues further that soft laws may sometimes lead to "weak" international laws thus further underscoring the fact that soft laws may lead to the development of a treaty in international law.[130]

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[122] *Ibid.*

[123] *Ibid.* Principle 4.

[124] *Ibid.* Principle 7.

[125] Alan Boyle, "Some Reflections on the Relationship of Treaties and Soft Law" (1999) 48 I.C.L.Q. 901, Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System,* (Oxford: Oxford University Press, 2000), Joseph Gold, "Strengthening the Soft International Law of Exchange Arrangements" (1983) 77 A.J.I.L. 77 at 443, (1988) P.A.S.I.L. 371. See also Shaw, *supra* note 24 at 110 – 111. *Blacks Law Dictionary* defined soft law as "Collectively, rules that are neither strictly binding nor completely lacking in legal significance. [In] International Law, [they are] guidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding." Soft laws are "enunciated in the form of inter-governmental declarations which are codified but without the usual signature and ratification process to confirm the consent of states as in a treaty." – Sunkin *et al*, *supra* note 60 at 5.

[126] Cassesse, *supra* note 60 at 491. See also Sunkin *et al*, *supra* note 60 at 5.

[127] *Ibid.* at 491.

[128] *Ibid.*

[129] *Ibid.* Sunkin *et al* argued that although soft laws are not legally binding, they play important role in international environmental law in three ways: "by pointing to the likely future direction of formally binding obligations; by informally establishing acceptable norms of behavior; and by codifying and possibly reflecting rules of customary international law." – See note 57.

[130] Sarah Percy, "Mercenaries: Strong Norm, Weak Law" in Emanuel Adler & Louis Pauly, eds., *International Organization* (Cambridge: Cambridge University Press, 2007) 367-397 [Sarah Percy].

Cassese points out that soft laws perform three major functions in international law.[131] First, they indicate matters of general concern and the proposed trend towards tackling such matters. Second, they deal with issues that the international community may not be sufficiently alert to. Third, due to political, economic or other reasons, it is difficult for states to reach a consensus on the best approach to create legally binding commitments. Cassese's observations explain the usefulness of voluntary initiatives as soft laws.

Soft law is beneficial in a number of ways. It creates various non-binding standards of reporting which numerous transnational corporations comply with. For instance, British Petroleum [BP] has various levels of reporting and has created indicators explaining the levels of reporting that comply with the United Nations *Global Compact*.[132] This underscores the influence of the *Global Compact* as soft law. Also, the BP 2007 Annual Report contains information on greenhouse gas emission and its impact on global warming[133] and outlines BP's efforts towards reducing carbon dioxide emissions.[134]

BP may not be legally obliged to make such disclosures but can BP recklessly publish untrue information with impunity? It is unlikely because the backlash might cause the company greater injury than non-publication by way of silence on such issues. Untrue statements may well be subject to verification especially by non-governmental organizations [NGO]. Where an NGO alerts the public of reckless but untrue publications in the annual report of a corporation, such information may affect stock value and shareholders might register their disgust. The board of directors may even be voted out. That way, soft laws exercise positive influence on corporations. They motivate a corporation to define and incorporate corporate responsibility into its business operations thereby contributing to continuous improvement in corporate standards. It also impresses on corporations that transparency impacts on brand value and corporate reputation. Soft laws will not eliminate all violations. It may not provide remedies for breach, but it fosters stakeholder relations and corporate citizenship.[135]

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[131] Cassesse, *supra* note 60 at 196.

[132] See British Petroleum Annual Report 2007: Environment and Society, Strategy and Analysis, Key to Various Levels of Reporting online: British Petroleum website <http://www.bp.com/extendedsectiongenericarticle.do?categoryId=9021646&contentId=7042819 >.

[133] See BP 2007 Annual Report: Environment and Society, Climate Change in Context online: <http://www.bp.com/sectiongenericarticle.do?categoryId=9021743&contentId=7042289>.

[134] BP 2007 Annual Report: Environment and Society, What BP Is Doing online: <http://www.bp.com/sectiongenericarticle.do?categoryId=9021745&contentId=7041006 >.

1.4 CONCLUSION

Generally, international law regulates only the conduct of states. This assertion is one of the fundamentals of international law and reflects the positivist view on the issue of international personality. The Norm in seeming recognition of this principle asserts that "States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights."[136] The Norm underscores this point by stating that "Nothing in these Norms shall be construed as diminishing, restricting or adversely affecting the human rights obligations of States under national and international law."[137] Consequently, the efforts of the Norm to establish the liability of corporations for human rights violations does not detract from the primary obligation of states to promote and protect human rights.

There are soft laws at the international level that prescribe guidelines for transnational corporations. The most recent is the Norm. The Norm is not legally binding and has not achieved the status of a treaty.[138] It remains soft law.[139]

In the absence of an international legal regime on the liability of transnational corporations, governments and non-governmental organizations have introduced a number of voluntary initiatives as a means of regulating transnational corporations.

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[135] Corporate citizenship refers to "corporate status in the state of incorporation..." – See Blacks Law Dictionary.

[136] *The Norm, supra* note 55. Principle 1.

[137] *Ibid.* Principle 19.

[138] De Schutter, *supra* note20.

[139] Alan Boyle, "Some Reflections on the Relationship of Treaties and Soft Law" (1999) 48 I.C.L.Q. 901, Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System,* (Oxford: Oxford University Press, 2000), Joseph Gold, "Strengthening the Soft International Law of Exchange Arrangements" (1983) 77 A.J.I.L. 77 at 443, (1988) P.A.S.I.L. 371. See Shaw, *supra* note 25 at 110 – 111. *Blacks Law Dictionary* defined soft law as "Collectively, rules that are neither strictly binding nor completely lacking in legal significance. [In] International Law, [they are] guidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding." Soft laws are "enunciated in the form of inter-governmental declarations which are codified but without the usual signature and ratification process to confirm the consent of states as in a treaty." – Sunkin *et al, supra* note 60 at 5.

Such initiatives include the *OECD Guidelines* and the *ILO Tripartite Declaration*. These initiatives regulate corporations on a voluntary basis. A major justification for voluntary measures is that states have the primary responsibility to regulate corporations.

Corporations have also evolved corporate code of conduct with the aim of self-regulation. These codes sometimes incorporate human rights as part of the objectives pursued by corporations. There have been unsuccessful attempts at legal regulation but the current position is that international law is yet to establish corporate liability for human rights violations.

CHAPTER TWO

ALIEN TORT CLAIMS ACT AND THE APPLICATION OF INTERNATIONAL LAW TO CORPORATIONS IN THE UNITED STATES

2.1 INTRODUCTION

Presently, international law does not have any set of binding legal rules regulating the conduct of transnational corporations. Perhaps the best example of a country that has applied international law to alleged torts and human rights violations by corporations is the United States. The legal basis for such exercise of jurisdiction is the *Alien Tort Claims Act*, 1789 [ATCA].[140] ATCA provides that "the district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States."[141] The discussion of ATCA and its scope shows how the United States federal courts have applied international law to violations of human rights.

2.2 DEVELOPMENT OF ATCA AS A MEANS OF ENFORCING TRANSNATIONAL TORT LITIGATION

The landmark case under the ATCA is *Filartiga v. Pena-Irala*[142] [*Filartiga*]. In *Filartiga*, Joel and Dolly Filartiga [the plaintiffs], who are citizens of Paraguay, sued Pena-Irala (a Paraguayan citizen) [the defendant] for torture and wrongful death of their seventeen-year-old son, Joelito. The plaintiffs alleged that the defendant tortured and killed their son because of his political beliefs and activities. At the time of Joelito's death, the defendant was the Inspector-General of Police in Asuncion, Paraguay. The defendant was deemed a state actor because his actions were in his official capacity as the Inspector-General.

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[140] 28 U.S.C. § 1350.

[141] *Ibid.* The United States federal courts rarely applied this legislation for nearly 200 years – Neil Conley, "The Chinese Party's New Comrade: Yahoo's Collaboration with the Chinese Government in Jailing a Chinese Journalist and Yahoo's Possible Liability under the Alien Torts Claim Act" (2006) 111 Penn. St. L. Rev. 171 at 172 [Conley].

[142] 630 F.2d 876 (2d. Cir. N.Y. 1980).

Plaintiffs also alleged that Joel Filartiga tried to initiate the prosecution of the defendant in Paraguay but his lawyer was arrested, tortured, threatened and disbarred. The defendant traveled to the United States but the Immigration and Naturalization Service arrested him and after a hearing, ordered his deportation.[143]

Before the defendant's deportation from the United States, plaintiffs served a claim under the ATCA on the defendant. The District Court dismissed plaintiffs' claim and held that the court had no subject matter jurisdiction over the suit.[144] The defendant was deported after this suit.

Plaintiffs appealed to the Second Circuit.[145] The Second Circuit held that plaintiffs were entitled to damages because torture committed by public officials had been the subject of "universal condemnation… in numerous international agreements" and renounced "as an instrument of official policy by virtually all of the nations of the world."[146] *Filartiga* subsequently gained prominence as the first successful suit brought under the ATCA in the United States by victims of international human rights violation.[147]

Filartiga also established the jurisdiction of United States federal courts over lawsuits filed by aliens in the United States alleging human rights violations committed outside the United States.[148] Based on the ATCA provision, plaintiffs can only sue in tort.[149] The Second Circuit in *Filartiga* addressed other jurisdictional issues under ATCA.

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[143] *Ibid* at 879.
[144] *Ibid.* at 880.
[145] *Ibid.*
[146] *Ibid.* at 880.
[147] Beth Stevens & Michael Ratner, "International Human Rights Litigation in U.S. Courts" (1996) in Neil J. Conley, "*The Chinese Party's New Comrade: Yahoo's collaboration with the Chinese Government in Jailing a Chinese Journalist and Yahoo's Possible Liability under the Alien Torts Claim Act*" (2006) 111 Penn. St. L. Rev. 171. *Filartiga* served as the catalyst for the enactment of the *Torture Victim Protection Act* of 1991 – See Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C.A., § 1350 (1994)). See also Gagnon, Macklin & Simons, *supra* note 93. This paper discusses the alleged human rights violations of Talisman Energy's subsidiary in Sudan. The authors pointed out at p.71 that the *Filartiga* case engendered the enactment of the *Torture Victim Protection Act* of 1991.
[148] *Ibid.* See Justin Lu, "Jurisdiction over Non-State Activity under the Alien Tort Claims Act" (1997) 35 Colum. J. Transnat'l L. 531 at 534. See also Jorge Cicero, "The Alien Tort Claims Act of 1789 as a Remedy for Injuries to Foreign Nationals Hosted by the United States (1992) Colum. H.R.L. Rev. 315 at 341.
[149] See note 141 for the ATCA provision.

The Court defined the "law of nations" (also known as customary international law) as the customs and usages of nations, the writings of eminent jurists and judicial decisions that recognize and enforce international law.[150] The Court further stated that the rules of the "law of nations" enforceable under ATCA should "command the general assent of civilized nations" because "[w]ere this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law."[151] The Court reasoned that the law of nations is in constant evolution and should be interpreted, as it currently exists.[152] The Court concluded that "official torture is now prohibited by the law of nations" because torture has been condemned in numerous international agreements and virtually all nations have renounced torture as an instrument of official policy.[153] Perhaps, the court's decision in this case and the purpose, which ATCA may serve later, was expressed in the following statement:[154]

> ...[T]he international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free from torture...Indeed, for purposes of civil liability, the torturer has become - like the pirate and slave trader before him –...an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

The above statement implies that ATCA is a jurisdictional statute and that victims of human rights violations may rely on ATCA to sue in the United States. It also suggests that aliens who may sue under ATCA do not necessarily have to sue United States citizens or residents. Seemingly, this is connected to the "ageless dream to free 'all' mankind from brutal violence." The fact that the court assumed jurisdiction and awarded damages to the plaintiffs even where none of the parties is a United States citizen emphasizes this assertion. The defendant merely came to the United States and faced deportation charges when he was sued. The post-*Filartiga* cases generally agreed that ATCA authorizes private civil claims where there is the violation of universally recognized international human rights.[155]

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[150] *Supra* note 142 at 880-81. Specifically, the Second Circuit stated that "the law of nations may be ascertained by consulting the works of jurists, writing professedly of public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."

[151] *Ibid.* at 881.

[152] *Ibid.*

[153] *Ibid.* at 880-84.

[154] *Ibid.*

The *Filartiga* case may be justified on the ground that the defendant was in the United States when plaintiffs commenced the lawsuit and this conferred personal jurisdiction on the United States court, over the defendant.

2.3 CLARIFICATION OF THE SCOPE OF ATCA BY THE UNITED STATES SUPREME COURT

It was only in 2004 that a claim based on ATCA, reached the United States Supreme Court for the first time. The case is *Sosa v. Alvarez-Machain* [*Sosa*] and the Supreme Court used the opportunity to clarify the scope of ATCA.[156] In *Sosa* the Supreme Court dispelled the notion that ATCA provides jurisdiction without a cause of action.[157] The Supreme Court stated that Congress would not enact a statute as a

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[155] See *Kadic v. Karadzic* 70 F.3d 232 (2d Cir. 1995) (The plaintiff alleged war crimes, genocide, crimes against humanity and torture against defendant. The alleged conduct occurred in Bosnia-Herzegovina); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996) (The plaintiff alleged torture and arbitrary detention in the Philippines).; *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (Plaintiff alleged torture, arbitrary detention, disappearance and summary execution in Guatemala). See also Beth Stephens, "Sosa v. Alvarez-Machain: "The Door is Still Ajar" for Human Rights Litigation in U.S. Courts" (2004-2005) 70 Brook. L. Rev. 533 at 541.

[156] 542 U.S. 692 (2004) at 715.

[157] *Ibid.* James Harrison,, "Significant International Environmental Law Cases 2004" (2005) 17 J. Envtl. L. 447. Justices Scalia, Rehnquist and Thomas disagreed with the majority opinion. They stated that the Alien Tort Statute is a jurisdictional statute which provides no fresh cause of action and argued that the issue is not whether the federal court is prevented from creating a common law cause of action, rather the issue is whether they are authorized to do so – 542 U.S. 692 (2004).

In *Sosa v. Alvarez-Machain*, Jose Francisco Sosa, a Mexican citizen [the defendant], acting for the United States Drug Enforcement Agency [DEA], kidnapped Dr. Alvarez-Machain [the plaintiff] in Mexico and handed him over to federal authorities for prosecution on a murder charge in the United States. The DEA alleged that the plaintiff participated in the abduction, torture and murder of Enrique Camarena-Salazar, a DEA agent, by drug barons in Mexico in 1985. The plaintiff is a medical doctor and his alleged role is that he kept Enrique alive, to enable the interrogation last longer. Plaintiff was acquitted of the charge of murder and brought this suit alleging that his abduction violated his civil rights. The District Court for the Central District of California partially granted the defendants' motion to dismiss the case. Ultimately, the suit got to the United States Supreme Court after several appeals. The Supreme Court stated that "whatever liability the United States had for the arrest of plaintiff in Mexico, at the instigation of the Drug Enforcement Agency" to enable the transportation of plaintiff across the Mexican border and plaintiff's lawful arrest by federal officers, "rested on events that occurred in Mexico and falls within the "foreign country" exception to waiver of government's sovereign immunity under the Federal Tort Claims Act [FTCA] – 28 U.S.C.A. §2680 (K). The "Foreign country" exception to waiver of government's sovereign immunity under the FTCA bars all claims against the United States federal government based on any injury suffered in a foreign country regardless of where the tortious act or omission giving rise to the injury occurred. The Supreme Court held that a single illegal detention of less than one day of a Mexico national and the transfer of custody to lawful authorities in the United States "jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action."[158] The Supreme Court affirmed that the "law of nations" is current international law and not international law at the time of enactment of the ATCA.[159] The Supreme Court then set the standard for the recognition of applicable international law under ATCA and stated:

> We assume…that no development in the two centuries from the enactment of §1350 to the birth of the modern line of cases beginning with *Filartiga*…has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law… Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.[160]

The Supreme Court clarified that the norms of international character under the 18th-century paradigm are the infringement of the rights of ambassadors, piracy and violation of safe conduct.[161] It explained that "[i]t was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATCA with its reference to tort."[162]

The Supreme Court in *Sosa* did not clarify the meaning of "tort" under ATCA. Andrew Wilson suggests that the word "tort" used in the ATCA provision refers to

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for prompt arraignment did not violate any customary international law so well defined as to support the creation of a cause of action that the District Courts could hear under ATCA. Since there was no remedy under ATCA, plaintiff's appeal was dismissed.

[158] No 03-339, slip op at 24 (U.S., 2004) [*Sosa*]. See also Andrew Wilson, "Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable under the Alien Tort Claims Act" in Olivier De Schutter, ed., *Transnational Corporations and Human Rights*, (Oregon: Hart Publishing, 2006) at 45.

[159] *Ibid.*

[160] *Ibid.*

[161] 542 U.S. 692 (2004) at 715. See also Bradford Mank, "Can Plaintiffs Use Multinational Environmental Treaties as Customary International Law to Sue Under the Alien Tort Statute?" online: SSRN website <http://ssrn.com/abstract=976990>.

[162] *Ibid.*

"wrongs" or "violations of international law."[163] He asserts that domestic common law and international law were not as rigidly separated in the 18th century as they are today.[164] He also opines that ATCA permits violations of international law to be treated as torts.[165] Therefore, conduct that may be treated as criminal under international law, such as genocide or torture, may ground an action in tort under ATCA.

The difficulty of the scope or meaning of "tort" under ATCA was obvious in the *Filartiga* case. The court characterized the wrong involved as torture, although the Filartigas alleged that Pena-Irala also directed the killing of their son. Municipal law would have characterized such conduct as murder. The Second Circuit never referred to murder as the basis for Pena-Irala's liability because ATCA authorizes a remedy for tort violations only. The Second Circuit consistently referred to torture, which it treated as a tort under ATCA. The implication is that where an alleged wrong involves actions that may be characterized as criminal (either under international or municipal law) and also as a tort under municipal law, an ATCA plaintiff can only sue based on the tortious aspects of the conduct under ATCA. Therefore Andrew Wilson's observation that 'tort' refers to wrongs or violations of international law truly reflects the manner in which United States courts have applied the ATCA.

2.4 CORPORATE LIABILITY UNDER ATCA

Sosa v. Alvarez-Machain held that ATCA provides a remedy in tort for violations of international law. Human rights are clearly an aspect of international law. The issue remains whether corporations are liable for human rights violations under ATCA. The case widely credited for resolving this issue is *Kadic v. Karadzic* [*Kadic*].[166] The case actually involved natural persons but the Second Circuit made some comments, which federal courts subsequently interpreted as implying that ATCA also applies to corporate violations of human rights.

In *Kadic*, the plaintiffs sued the head of the Bosnian Serb regime, Radovan Karadzic [the defendant], for human rights abuses including torture, war crimes and

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[163] De Schutter, *supra* note 20 at 47.
[164] *Ibid.*
[165] *Ibid.*
[166] 70 F. 3d 232 (2nd Cir. Cal. 1996).

genocide. Troops of the Bosnian Serb regime committed the alleged violations. The Second Circuit regarded the defendant as a non-state actor and his actions were deemed the actions of a private individual. The reason is that although the then Bosnian Serb regime controlled large segments of Bosnia, the international community never recognized it as a state.

The Second Circuit noted that international law delimits who comes within the jurisdiction of ATCA and held that the prohibition of genocide and certain war crimes applies to all actors, including private citizens.[167] The court further stated that although some international norms regulate only official actions (state actions), private actors are liable under ATCA where they act "in concert with" a state to commit international violations.[168]

The Second Circuit exercised jurisdiction over the defendant because he was served with plaintiffs' claim in the United States while on a visit. The Second Circuit awarded damages against the defendant.

It seems *Filartiga* and *Kadic* were properly decided. This is because the majority decision of the Supreme Court in *Sosa* cites both cases with approval. The Court did not discuss how both cases comply with *Sosa*. Rather, the Supreme Court enjoins federal courts to exercise restraint and avoid new and debatable violations of international law. The Supreme Court emphasizes that federal courts should enforce law of nations with definite content and acceptance among civilized nations. *Filartiga* deals with torture while *Kadic* deals with torture, war crimes and crimes against humanity. These violations committed in *Filartiga* and *Kadic* are recognized as violations of international law by civilized countries. Therefore, one may conclude that the award of damages in both cases were proper since ATCA provides remedies in tort for violations of international law.

The genesis of ATCA application to corporations lies in the statement by the Second Circuit that torture, genocide and certain international war crimes apply to all actors including private citizens. Subsequent cases inferred that private citizens include corporations. A similar comment by the same court that private actors are liable under

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[167] *Ibid.* See also Beth Stephens, "Corporate Liability: Enforcing Human Rights Through Domestic Litigation" (2000-2001) 24 Hastings Int'l & Comp. L. Rev. 401 at 407.
[168] *Ibid.* The court awarded damages against the defendant.

ATCA where they act in concert with a state to commit international violations served as endorsement for ATCA application to corporations including oil companies. In ATCA cases involving oil corporations, plaintiffs usually allege indirect liability through corporate aiding and abetting a host state to commit human rights violations.

In *Doe v. Unocal Corporation* [*Unocal*] the plaintiff sued Unocal for alleged complicity in human rights violations committed by the Myanmar government and military, which included forced labor, murder, torture and rape during the construction of the Yadana gas pipeline in Myanmar.[169] Plaintiffs alleged that Unocal hired the Myanmar military to secure its pipeline, knowing its reputation for human rights violations and that Unocal failed to act when it was obvious that the military used forced labour, rape, torture, among other international law violations, while securing Unocal's pipeline route.

The District Court found without express discussion that corporations may be liable for human rights violations. It granted Unocal's motion for summary judgment on the ground that mere knowledge of human rights violations was not sufficient to establish liability in international law without evidence that Unocal assisted the Myanmar government in the alleged human rights violations.[170]

On appeal by the defendants, the Ninth Circuit while discussing the liability of corporations under ATCA cited Black's Law Dictionary with approval and stated that the "law of nations" is "the law of international relations, embracing not only nations but also ... individuals (such as those who invoke their human rights or commit war crimes).[171] The Ninth Circuit did not discuss whether individuals include corporations. One may conclude from this case that it does because the Ninth Circuit observed that a private party included Unocal (the defendant corporation in the lawsuit) and it evaluated the liability of Unocal under ATCA.

The Ninth Circuit further stated that torture, slavery and murder are violations of *jus cogens*. It defined *jus cogens* as "norms of international law that are binding on nations even if they do not agree to them."[172] Are they binding on corporations as well? Without addressing this issue, it held that the violation of *jus cogens* is "a violation of 'specific, universal, and obligatory' international norms" that is actionable under the ATCA.[173] The court widened the scope of ATCA by asserting that "any violation of 'specific, universal, and obligatory' international norms"- *jus cogens* or not - is actionable under the ATCA.[174] Therefore, ATCA covers violations of *jus cogens* and any violation of obligatory international norms. Subsequent cases show that while the violation of an international norm may be actionable under ATCA, a plaintiff that relies on an international norm is unlikely to succeed, unless the international norm is obligatory in the sense of *jus cogens*.[175]

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[169] 963 F. Supp 880 (C.D. Cal. 1997). See also 2002 WL 31063976 (9th Cir. Cal. Sept. 18, 2002).

[170] Unocal, which was later acquired by ChevronTexaco, settled the case for a reported sum of $15million. This was hailed as a victory for human rights – Daphne Eviatar, "A Big Win for Human Rights" *The Nation* (9 May 2005).

[171] 395 F.3d 932 (9th Cir. Cal. Sept 18, 2002).

In *Presbyterian Church of Sudan v. Talisman Energy Inc.* [*Talisman*] the plaintiffs sued Talisman Energy [Talisman], a Canadian corporation, for conspiracy with the government of Sudan to commit acts of genocide, enslavement, torture, rape, and other human rights violations.[176] Plaintiffs alleged that Talisman aided and abetted the government of Sudan to commit these human rights violations because of Talisman's interest in Sudanese oil. Talisman's interest in Sudan consisted of a 25% share interest in Greater Nile Petroleum Operating Company [Greater Nile].[177] The Sudanese government granted concessions to Greater Nile to explore for and extract oil from certain blocks in Southern Sudan. Talisman acquired its interest in Greater Nile through Talisman (Greater Nile) BV, a wholly owned Dutch subsidiary of Talisman. Talisman did not conduct operations directly in Sudan but the plaintiffs alleged that Talisman directed and coordinated the oil operations through its senior officers.

Talisman argued that no treaty or international tribunal decision imposes liability on corporations for violations of customary international law relating to human rights. According to Talisman, this demonstrates that corporate liability is not part of customary international law.

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[172] *Ibid.*
[173] *Ibid*
[174] *Ibid.*
[175] See *Abdullahi v. Pfizer Inc.*, WL 31082956 (S.D.N.Y. 2002). This case is discussed later in Section 2.7.
[176] 244 F. Supp.2d 289 (S.D.N.Y. 2003).
[177] *Ibid.*

The United States federal courts for the first time evaluated the application of ATCA to corporations. The District Court cited the comment of the Supreme Court in *Sosa v. Alvarez-Machain*, wherein the Supreme Court emphasized the need for federal courts to consider whether the violation of a "given norm" incurs international liability where "the defendant is a private actor such as a corporation."[178] The District Court interpreted this comment as a Supreme Court endorsement that ATCA applies to corporations.

The District Court said that determining whether a rule is part of customary international law requires looking "primarily to the formal lawmaking and official actions of States."[179] "States need not be universally successful in implementing [a] principle in order for a rule of customary international law to arise."[180] The position of the International Criminal Tribunals for the former Yugoslavia and Rwanda, together with ATCA cases such as *Kadic v. Karadzic*, addressing this issue, is that customary international law prohibiting violations such as genocide applies to private actors as well as state actors.[181] The District Court held that there is no principled basis for distinguishing that "acts such as genocide should give rise to liability when performed by some private actors such as individuals, but not by other private actors like corporations."[182] From the foregoing, private actors include individuals as well as corporations and corporations are liable like natural persons under international law. One may note that the extent of ATCA recognition of corporate legal status under international law is limited to instances where an individual possesses legal status under international law. Although ATCA has recognized the legal status of transnational corporations, there is no consensus among international scholars that transnational corporations are subjects of international law. Other federal courts have not embarked on a similar consideration of the application of ATCA to corporations but since the federal courts have assumed jurisdiction in a number of cases over corporations without even discussing this issue, one may conclude that ATCA applies to corporations.

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[178] *Ibid.* See also *Sosa v. Alvarez-Machain*, 124 S. Ct. at 2766, n.20.
[179] *Ibid.*
[180] *Ibid.*
[181] *Ibid.*
[182] *Ibid.*

2.5 CORPORATE LIABILITY FOR HUMAN RIGHTS VIOLATIONS BY THE HOST STATE

In *Presbyterian Church of Sudan v. Talisman Energy Inc.*, [*Talisman*] the United States District Court discussed the circumstances that may lead to corporate liability for human rights violations committed by a state.[183] It stated that liability may result from conspiracy or aiding and abetting. The court reasoned that under international law, conspiracy applies only to offences that involve conspiracy to commit genocide or a common plan to wage aggressive war. Other instances of conspiracy do not apply because "only the present day law of nations may form the basis of an ATCA claim."[184] The court held that the plaintiffs had to establish direct liability. A plaintiff will not succeed by merely asserting that a "defendant who does not directly commit a substantive offense may nevertheless be liable if the commission of the offense by a co-conspirator in furtherance of the conspiracy was reasonably foreseeable to the defendant as a consequence of their criminal agreement."[185]

The District Court noted that the plaintiffs' contention was that Talisman joined in a conspiracy to displace residents with knowledge of its goal, and furthered its purpose by (a) designating new areas for oil exploration with the understanding that it would require the coercive action of the Sudanese government to "clear" those areas; (b) paving and upgrading the Heglig and Unity airstrips with knowledge that Government helicopters and bombers would use them in launching attacks on civilians; and (c) paying royalties to the Government with the knowledge that the funds would be used to purchase weaponry.[186] The District Court observed that the intentional targeting of civilians may constitute a war crime. The alleged facts did not amount to conspiracy to commit genocide or to wage aggressive war because they did not disclose direct actions by Talisman evidencing such intention. The court granted Talisman's application for summary judgment and dismissed the suit.

On aiding and abetting as a means of establishing indirect corporate liability for human rights violations by a state, the District Court stated that there is a "settled, core notion of aider and abettor liability in international law."[187] The requirement is that a plaintiff must show "knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime."[188] The material elements must be committed with knowledge and intent as required by Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [Rome Statute].[189]

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[183] 453 F.Supp.2d 633 (S.D.N.Y., 12 September 2006).

[184] *Ibid.*

[185] *Ibid.*

[186] *Ibid.*

The District Court cited with approval the judgment of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia [ICTY] which described the *actus reus*[190] of aiding and abetting as requiring that the acts must be "specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime" and the support must have "a substantial effect upon the perpetration of the crime."[191] The mental element or *mens rea* of the crime of aiding and abetting is defined as "knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal."[192] To have a "substantial effect" it is not necessary to show that assistance constituted an indispensable element of the crime, only that "the criminal act most probably would not have occurred in the same way had not someone acted in the role the accused in fact assumed."[193]

The District Court stated that the phrase "specifically directed" may have been designed to address the issue of whether assistance must be "direct".[194] Having discussed the position of the law of nations on aiding and abetting, the District Court then set the parameters of the tort of aiding and abetting under ATCA as requiring that the plaintiff must prove:[195]

1. that the principal violated international law;
2. that the defendant knew of the specific violation;

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[187] *Ibid.*

[188] *Ibid.*

[189] U.N. Doc. A/ CONF.183/9 (17 July 1998), art. 25(3), art. 30.

[190] *Actus reus* means the "guilty act" or the "wrongful deed that comprises the physical components of a crime…" – Black's Law Dictionary.

[191] *Prosecutor v. Vasiljevic,* Case No. IT-98-32-A, Judgment, 102(i) (App. Chamber, Feb. 25, 2004) cited in *Presbyterian Church of Sudan v. Talisman, supra* note 176.

[192] *Ibid.*

[193] *Presbyterian Church of Sudan v. Talisman*, 244 F. Supp.2d at 324 citing *Prosecutor v. Tadic,* Case No. 94-1-T, Opinion and Judgment, 688 (Trial Chamber, May 7, 1997).

[194] See *Presbyterian Church of Sudan v. Talisman*, supra note 193 citing *Prosecutor v. Vasiljevic, supra* note 191.

[195] *Ibid.*

> 3. that the defendant acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation;
> 4. that the defendant's acts had a substantial effect upon the success of the criminal venture; and
> 5. that the defendant was aware that the acts assisted the specific violation.

Talisman sets an almost impossible standard for any ATCA plaintiff to meet. It is unlikely that even a reckless corporation would specifically direct its acts to assist the commission of genocide or to wage an aggressive war. Perhaps, the utility of the delineated scope of conspiracy under ATCA is that future plaintiffs should properly appraise their options before embarking on expensive and time-consuming litigation.

2.6 PARENT LIABILITY FOR THE ACTS OF ITS SUBSIDIARY

The Talisman case also addressed the liability of a parent corporation for torts committed by its subsidiary. We may recall that Talisman held an indirect share interest in Greater Nile Petroleum Operating Company [Greater Nile] and that Talisman acquired its interest in Greater Nile through Talisman (Greater Nile) BV [TGN], its wholly owned Dutch subsidiary.[196]

The District Court evaluated two possible ways that may lead to the liability of a parent corporation for the conduct of its subsidiary. These are where a plaintiff alleges sufficient facts for the court to pierce the veil or establishes that an agency relationship exists between the parent and its subsidiary.

Piercing the veil is a corporate law principle. In common law jurisdictions, it "is commonly used to describe situations in which judges have presumed to simply ignore the existence of the corporate person and fix liability on the managers or the shareholders."[197] The District Court stated that the applicable law for lifting the veil in the Talisman case was not the common law but Dutch law, the country of incorporation of TGN. A discussion of Dutch law for lifting the veil is unhelpful because the applicable law simply depends on the law of the country where the subsidiary is incorporated.

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[196] *Supra* notes 176.

[197] Bruce Welling *et al.*, *Canadian Corporate Law: Cases, Notes & Materials*, 3rd ed. (Toronto and Vancouver: Butterworths, LexisNexis Canada Inc., 2006) at 142. Blacks Law Dictionary defined "piercing the corporate veil" as "the judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." It added that "piercing the corporate veil" "is also termed disregarding the corporate entity."

The District Court in the *Talisman* case also considered agency as a basis for parent liability for the acts of a subsidiary. The court noted that under federal law in the United States, an agency relationship "depends on the existence of three elements: (1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking."[198]

The court reasoned that the applicable law would be the law of Sudan, which is the locus for the tort and residence of most of the plaintiffs, or the law of Canada, which is the domicile of Talisman. The court held that the presumption was that Sudanese law would apply. The court declined an evaluation of such presumption because the parties did not provide evidence of Canadian and Sudanese laws on agency.

From the foregoing, the agency liability of a parent corporation for the acts of its subsidiary depends on a choice of law. A determination of the choice of law depends on the locus of the tort and the residence of the parties. The presumption that Sudanese law applied implies that where a United States parent corporation is involved in ATCA litigation, it is unlikely that United States law on agency will apply. The reason is that ATCA litigation presupposes a tort, which occurred outside the United States and litigation against transnational oil corporations involves class actions, which implies that many of the plaintiffs would probably be resident in the country where the tort was committed. The choice of law would probably be that of the country where the tort was committed. This is the position in many common law jurisdictions. The implication is that the applicable law is uncertain because it varies as long as the country where the tort was committed varies.

2.7 DIRECT LIABILITY OF CORPORATIONS UNDER THE ATCA

This section deals with the direct liability of corporations under the ATCA. It is different from cases evaluated above which apply where the alleged tort is committed by a state but the ATCA plaintiffs tried to establish indirect liability of oil corporations through conspiracy or aiding and abetting. Direct liability applies where the corporation sued by an ATCA plaintiff committed the alleged tort.

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[198] *Cleveland* v. *Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir.2006).

It also evaluates whether non-binding norms or codes can found liability under ATCA and assesses whether some types of treaty can found the basis for liability under ATCA.

2.7.1 DIRECT LIABILITY OF PARENT CORPORATION FOR ITS CONDUCT

Abdullahi v. Pfizer Inc., [*Abdullahi*] evaluated the direct liability of a parent corporation for its conduct in a host state.[199] In *Abdullahi*, the plaintiffs sued Pfizer for testing an unapproved antibiotic, Trovan, in Kano, Nigeria. Pfizer allegedly projected that its total annual sales of Trovan would be more than one billion dollars but the plaintiffs alleged that Pfizer tested the drug in Nigeria to hasten its approval in the United States by the Food and Drug Authority [FDA]. According to the plaintiffs, prior animal testing conducted by Pfizer indicated that Trovan "might cause significant side effects in children, such as joint disease, abnormal cartilage growth (osteochondiosis, a disease resulting in bone deformation) and liver damage."[200]

Pfizer's antibiotic was "new, untested and unproven".[201] Plaintiffs also alleged that prior to Pfizer's Nigerian drug trial, only one child had been treated with Trovan after all other antibiotics failed, and no child ever received Trovan orally.

Pfizer had no approval for its drug trial because there was no ethics committee at the Kano hospital before it conducted the drug trial. Pfizer "selected from lines of those awaiting treatment, children ranging in age from one to thirteen years who exhibited symptoms of neck stiffness, joint stiffness, and high fevers with headaches."[202] The children were divided into two groups and Pfizer treated half of them with Trovan and the other half with "purposefully low-dosed" ceftriaxone, an effective FDA-approved drug for treating meningitis.[203] "In order to enhance the comparative results of Trovan, Pfizer administered only one-third of ceftriaxone's recommended dosage."[204]

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[199] WL 31082956 (S.D.N.Y. 2002).

[200] *Ibid.*

[201] *Ibid.*

[202] *Ibid.*

[203] *Ibid.*

Plaintiffs further alleged that children, who did not respond to Trovan, had their treatment switched to ceftriaxone but the low dosing of ceftriaxone resulted in injuries and death among the control group. Pfizer's team departed after two weeks and never returned for follow-up evaluations. Plaintiffs further stated that five of the children who received Trovan and six children "low-dosed" by Pfizer died.[205] "Others suffered paralysis, deafness and blindness."[206]

Pfizer's protocol called for the consent of parents because the children were too young. Only few parents could speak and read English. Plaintiffs stated that Pfizer did not explain to the parents that the proposed treatment was experimental, that they could refuse the treatment, and that other organizations "offered more conventional treatment at the same site free of charge."[207]

Plaintiffs also alleged that on December 30, 1996, Pfizer applied for FDA approval to market Trovan in the United States for the treatment of infectious diseases on children, among other uses. FDA inspectors discovered inconsistencies in Pfizer's Nigerian trial data. The regulators informed Pfizer of their concerns, which included Pfizer's lack of follow-up examination. The FDA stated that it planned to deny Pfizer's application and in response, Pfizer withdrew its application.

The plaintiffs stated that the FDA subsequently approved Trovan for the treatment of adults and on February 18, 1998 Pfizer launched the drug. Shortly after the launch, FDA and Pfizer received reports that patients treated with Trovan suffered liver damage. In June 1998, FDA published reports indicating that Trovan was strongly associated with liver toxicity and acute liver failure. Pfizer agreed to limit the distribution of Trovan to long-term nursing homes and hospitals. Plaintiffs stated that "the European Union's Committee on Proprietary Medicinal Products suspended all sales of Trovan in part due to results from the Kano tests."[208] In January 1999, the FDA restricted the use of Trovan and stated that it may only be recommended for patients (in nursing homes or hospitals) suffering from life threatening conditions.

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[204] *Ibid.*
[205] *Ibid.*
[206] *Ibid.*
[207] *Ibid.* Doctors without Borders was one of the other organizations that offered treatment at the Kano, Nigeria hospital.
[208] *Ibid.*

The plaintiffs sued for damages under ATCA, for Pfizer's alleged violations of international law such as the *Nuremberg Code*,[209] the *Declaration of Helsinki*,[210] Article 7 of the *International Covenant on Civil and Political Rights*,[211] among other international norms. The parties agreed that if the alleged facts were established, Pfizer would be liable in negligence. The District Court had to find an international law provision or customary international law establishing that Pfizer's conduct constituted a violation of international law. The court had to appraise the above international documents to determine whether the breach of any of those documents constitutes a violation of international law. An evaluation of these norms creates insight into the reasons that influenced the court's decision that Pfizer was not bound by these international documents.

2.7.1.1 THE NUREMBERG CODE

The earliest international law regulation on clinical research is the *Nuremberg Code*.[212] In 1947, judges at the Nuremberg war crimes tribunal laid down ten principles or standards that physicians carrying out experiments on human subjects must comply with to maintain ethical standards.[213] The *Nuremberg Code* strives to maintain "moral, ethical and legal concepts" and enunciates the primacy of the voluntary informed consent of subjects before conducting medical research.[214]

The research subject should have the legal capacity to consent and sufficient knowledge and understanding of the subject matter to facilitate informed consent.[215] Consent should be free from fraud, deceit, force, duress or any other form of constraint.[216] The physician or researcher should disclose the nature, method and duration of the experiment together with all hazards, inconveniences and reasonably expected effects on health.[217] The experiment should be conducted first on animals and the results should justify an expectation that similar experiment on humans may produce medical discovery.[218]

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[209] *Nuremberg Code* online: <http:www.cipr.org/library/ethics/Nuremberg/> [*Nuremberg Code*].

[210] *Declaration of Helsinki* online: <http:www.wma.net/e/policy/b3.htm>.

[211] 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No.47, 6 I.L.M. 368 (entered into force 23 March 1976).

[212] *Nuremberg Code*, *supra* note 209.

[213] Jonathan Mann *et al*, ed., Judges Harold Sebring, Walter Beals & Johnson Crawford, *The Nuremberg Doctors' Trials: The Judgment in Health and Human Rights: A Reader* (Np: 1999) at 292-300 [Sebring].

[214] Kevin King, "A Proposal for the Effective International Regulation of Biomedical Research Involving Human Subjects" (1998) 34 Stan. J. Int'l L. 163 [Kevin King].

[215] *Nuremberg Code*, *supra* note 209.

Researchers should not conduct experiments where they reasonably believe that it could lead to disability or death except in situations where the experimental physicians also serve as human subjects.[219] The risk taken in the medical research should not outweigh the societal benefits of the research. This is the crux of the allegation by the plaintiffs that similar test on animals showed that Trovan could cause joint disease, abnormal cartilage growth and liver damage. In essence, plaintiffs' contention is that the results of an earlier test on animals showed that Pfizer had no justification to conduct the drug trial in Nigeria on humans.

Only skilled and qualified scientists should embark on medical research.[220] The research subject may end the experiment at any stage.[221] The researcher should terminate the experiment where he reasonably believes that continuation of the experiment may result to death, disability, or injury.[222]

In western countries, the *Nuremberg Code* has influenced the development of national legislation on the protection of human subjects during medical research.[223] The *Nuremberg Code* has also led to the establishment of several biomedical ethics organizations.[224] It has served as the catalyst for the development of other international guidelines on medical research such as the *Declaration of Helsinki* and the *Council for International Organizations of Medical Sciences Guidelines.*[225]

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[216] *Ibid.*
[217] *Ibid.*
[218] *Ibid.*
[219] *Ibid.*
[220] *Ibid.*
[221] *Ibid.*
[222] *Ibid.*
[223] David Carr, "Pfizer's Epidemic: A Need for International Regulation of Human Experimentation in Developing Countries" Case W Res. J Int'l L. online<http://law.case.edu/student_life/journals/jil/Notes/Carr.pdf >.
[224] *Ibid.* The World Health Organization and the World Medical Association are examples of such ethics organizations.
[225] *Ibid.*

After evaluating the *Nuremberg Code* the District Court stated that it is not a binding international document because it contains non-binding international norms that do not form part of customary international law. The District Court then evaluated the *Declaration of Helsinki.*

2.7.1.2 DECLARATION OF HELSINKI

The *Declaration of Helsinki* [the Declaration] is a policy statement of the World Medical Association [WMA], adopted in 1964.[226] It has been amended five times and the latest amendment was in 2000.[227] WMA developed the Declaration as guidance to physicians on ethical principles regulating the participation of human subjects during medical research.[228] It imposes a duty on physicians to safeguard and promote the health of the people.[229] It recognizes that medical progress depends on research, which rests in part on experimentation involving human subjects.[230] However, the protection of the wellbeing of the research subject takes precedence over the interest of the society and the quest for discovery.[231]

The Declaration states that "medical research is subject to ethical standards that promote respect for all human beings" and the protection of their health and rights.[232] It advocates special attention for the protection of economically disadvantaged persons together with persons who cannot give or refuse consent or subjects whose consent may be secured by duress.[233]

Those who will not benefit personally from the research and persons for whom the research is combined with care require special attention.[234] Researchers should appraise the ethical, legal and regulatory standards in their countries together with applicable international rules before embarking on research on human subjects.[235]

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[226] See the World Medical Association: Physicians Caring for the World online: <http:www.wma.net/e/ethicsunit/Helsinki.htm>.
[227] *Ibid.* The amendments were in 1975, 1983, 1989, 1996 and 2000.
[228] See the Declaration of Helsinki online: <http:www.wma.net/e/policy/b3.htm>.
[229] *Ibid.* Art. 2.
[230] *Ibid.* Art. 4.
[231] *Ibid.* Art 5.
[232] *Ibid.* Art 8.
[233] *Ibid.*
[234] *Ibid.*
[235] *Ibid.* Art 9.

National regulatory standards should not reduce or eliminate the protection for human subjects enunciated in the Declaration.[236]

The Declaration establishes basic principles for medical research and imposes a duty on physicians "to protect the life, health, privacy, and dignity of the human subject" participating in medical research.[237] The subjects of medical research must be volunteers and informed participants.[238] The subjects must be adequately informed of the aims, methods, anticipated benefits, potential risks and possible discomfort.[239] The objective of the research must outweigh the inherent risks to the subject.[240] The research should be based on thorough knowledge, scientific principles, adequate laboratory tests and where applicable, animal experimentation.[241] Article 13 provides:[242]

> The design and performance of each experimental procedure involving human subjects should be clearly formulated in an experimental protocol. This protocol should be submitted for consideration, comment, guidance, and where appropriate, approval to a specially appointed ethical review committee, which must be independent of the investigator, the sponsor or any other kind of undue influence. This independent committee should be in conformity with the laws and regulations of the country in which the research experiment is performed. The committee has the right to monitor ongoing trials.

Article 13 embodies the allegation that Pfizer neither got approval from an ethics review committee nor conducted follow-up on the patients.[243] Unfortunately, the Declaration is not legally binding.[244] The District Court assessed the Declaration and held that it merely recommends non-binding international law standards. The plaintiffs could not rely on it to establish Pfizer's liability under international law.

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[236] *Ibid.*
[237] *Ibid.* Art. 10.
[238] *Ibid.* Art. 20.
[239] *Ibid.* Art. 22.
[240] *Ibid.* Art. 18.
[241] *Ibid.* Art. 11.
[242] *Ibid.* Art. 13.
[243] *Abdullahi v. Pfizer, supra* note 199.
[244] Kevin King, *supra* note 214. See also the Council for International Organizations of Medical Sciences Guidelines (CIOMS). The Guidelines provide for ethical justification of the research, informed consent, vulnerability of research subjects, confidentiality, compensation for injury, strengthening of national capacity for ethical review among others. The guidelines address controversies that characterize biomedical research ethics and aims to protect research subjects. See the website of the CIOMS online: <http:www.cioms.ch/frame_guidelines_nov_2002.htm>.

2.7.1.3 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The District Court then assessed the *International Covenant on Civil and Political Rights* [ICCPR].[245] Article 7 of the ICCPR provides that "no one shall be subjected without his free consent to medical or scientific experimentation."[246] The ICCPR is a treaty[247] and it should be binding on a country that ratified and incorporated it into its laws. If binding, the ICCPR would create international obligations on Pfizer.

The District Court observed that although the ICCPR might evidence binding principles of international law, the treaty is non-self-executing.[248] This is because the United States signed the treaty without an intention that it would be immediately binding. While the plaintiffs need not rely on ICCPR to establish a private cause of action, "they may look to that treaty to allege that Pfizer's conduct violated well-established, universally recognized norms of established international law."[249] The court did not explain further but the statement suggests that although the United States had not incorporated the ICCPR into its laws, the provisions are binding as part of customary international law and the plaintiffs may rely on it to establish Pfizer's liability. This reasoning is consistent with the court's dismissal of the suit on a different ground relying on the principle of *forum non conveniens.*[250]

Forum non conveniens means "that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place."[251] Under this principle, a court can grant a stay to enable the plaintiff institute action in another jurisdiction, deemed a more appropriate country for the determination of the rights and obligations of the parties. The District Court held that Nigeria was the natural forum for the plaintiffs to pursue their claim and granted a stay to enable the plaintiffs to institute action in Nigeria.

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[245] 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No.47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976).

[246] 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No.47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976).

[247] Harris, *supra* note 30 at 112.

[248] See *United States v. Toscanino* 500 F.2d 267, 275-76 (2d Cir. 1974).

[249] See *Kadic* 70 F.3d at 239 citing *Filartiga v. Pena-Irala* 630 F. 2d at 881, 888.

[250] The principle of *forum non conveniens* is evaluated in Chapter Four.

[251] *Black's Law Dictionary*, 8th ed., *s.v.* "*forum non conveniens*".

2.8 CONCLUSION

An evaluation of the ATCA cases shows that only two lawsuits have been successful. These are the *Filartiga* and *Kadic* cases. The oil corporation cases failed because there was no direct link between the oil corporations and the alleged tort committed by the various states or state officials involved.

Plaintiffs in oil corporation cases usually assert conspiracy or aiding and abetting. Given the tenuous connection between oil corporations and the alleged tort in *Unocal* and *Talisman*, the standard of proof required to establish conspiracy or aiding and abetting is high. Any serious plaintiff who intends to sue an oil corporation based on similar facts should realize that proof of the required elements is a cherished illusion.

Oil corporations just like other companies are interested in the maximization of shareholder value. It is most unlikely that any oil corporation would engage in sufficient direct action that would enable a plaintiff establish either conspiracy or aiding and abetting as set out in the *Talisman* case.

On the other hand, the *Pfizer* case, which dealt with the direct liability of corporations, is troubling due to the rigid application of *forum non conveniens*. The District Court dismissed the suit based on *forum non conveniens* because the vexation that would result in pursuing the relevant Nigerian discovery while litigating in the United States was grossly disproportionate to any inconvenience that the plaintiffs may experience if they sued in Nigeria.

The plaintiffs appealed the judgment.[252] Plaintiffs in their motion asked the Court of Appeals to take judicial notice that the Nigerian Federal High Court, on August 19, 2002 "dismissed" a parallel lawsuit filed in Nigeria (*Zango v. Pfizer*) [*Zango*] involving different plaintiffs but based on the same subject matter.[253] Plaintiffs in the Nigerian lawsuit filed a notice of discontinuance because of indefinite adjournment and the fact that the judge hearing the case "declined jurisdiction 'for personal reasons.'"[254]

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[252] 2003 WL 22317923 C.A. 2 (N.Y.)).
[253] *Ibid.*

Pfizer alleged that the Nigerian lawsuit was discontinued for reasons other than those disclosed in the Notice of Discontinuance. The Court of Appeals vacated the order and remanded the suit for the lower court to determine whether dismissal of a parallel lawsuit in Nigeria precluded dismissal of plaintiffs' action on ground of *forum non conveniens.*

The suit went back to the District Court and Pfizer argued that the plaintiffs in the Nigerian action caused the delay in the suit. Plaintiffs contended that Pfizer caused the delay.[255] The District Court found that there was no dispute that the Nigerian judiciary caused some of the delay. For instance, Judge Nwaogwugwu, the assigned judge, was unavailable for personal reasons on July 30, 2001 and the suit was adjourned to September 24, 2001. In November 2001, Judge Nwaogwugwu "was removed from the bench" because he assumed jurisdiction over an unrelated suit which he had no authority to adjudicate."[256]

On April 22, 2002, Judge Hobon became the assigned judge. Less than three months after Judge Hobon became the assigned judge, he declined jurisdiction for "reasons personal" to him and "transferred the action to Court 1" where the suit originated.[257] On August 19, 2002, the *Zango* plaintiffs prepared a notice of discontinuance but did not file it until October 17, 2002. *Zango* plaintiffs stated on record that they filed the notice of discontinuance because Honourable Justice Haroun Adamu of the Federal High Court 2, Kano, had declined jurisdiction on the suit and had adjourned the suit indefinitely on July 4, 2002.

Plaintiffs contended that no new judge was appointed for the Nigerian lawsuit and blamed corruption and bias in the Nigerian judiciary as reasons for the unfortunate delays. Plaintiffs' contention was unsupported by evidence and the plaintiffs conceded that it might be impossible to explain the "personal" reasons that induced Judge Hobon to decline jurisdiction.[258]

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[254] *Ibid.*
[255] 2005 WL 1870811.
[256] *Ibid.*
[257] *Ibid.*

Plaintiffs further alleged that the Nigerian judiciary was corrupt and biased, and "judges have been known to withdraw from cases for personal reasons when they are being subject to undue pressure or harassment to rule in a particular direction."[259] Plaintiffs also alleged that Pfizer engaged in "bribery of judicial or law enforcement officials."[260] Plaintiffs asserted that "Justice Hobon declined jurisdiction because he was subject to improper or undue pressure, perhaps from Pfizer itself, or from government officials friendly with Pfizer who had been involved with the Trovan tests."[261]

The District Court observed that the *Zango* plaintiffs did not state on record that they discontinued the lawsuit because of corruption or bias in favor of Pfizer. Ultimately, the court held that the Zango lawsuit did not preclude the dismissal of this action on the ground of *forum non conveniens*.[262]

Since ATCA authorizes litigation by aliens, the locus of the tort should be outside the United States. This implies that some of the parties would most likely be resident in the country where the tort occurred. In the *Filartiga* case, the tort occurred in Paraguay, the plaintiffs were Paraguayans and they sued the defendant in the United States and served the defendant while he was subject to deportation proceedings. If the District Court had rigidly applied *forum non conveniens*, it most probably would have declined jurisdiction because the alleged torts occurred in Paraguay and the defendant was already subject to deportation proceedings. The court assumed jurisdiction and awarded damages to the plaintiffs. A similar argument applies to *Kadic*, where the court assumed jurisdiction over Radovan Karadzic, the defendant, who was served with the claim while on a visit to the United States. At the time when the District Court awarded damages against the defendant, he had left the United States. While jurisdiction over alleged crimes against humanity in *Kadic* may be justified as conferring universal jurisdiction on the United States courts, the same argument would not apply to torture that occurred in Paraguay. Arguably, the *forum conveniens* analysis in *Pfizer* should be limited to the peculiar facts of the case because the plaintiffs had to conduct discovery concerning the incident at the Kano government hospital, in Nigeria. The United States courts could not compel the Nigerian Health Authority if it failed to co-operate with the discovery.

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[258] *Ibid.*
[259] *Ibid.* Kussel Letter at 4.
[260] *Ibid.*
[261] *Ibid.* Kussel Letter at 4-5.
[262] See also *Adamu v. Pfizer Inc.* 399 F. Supp. 2d 495 (S.D.N.Y 2005). The suit is on the same subject-matter as *Abdullahi v. Pfizer Inc.* The court held that it lacked subject-matter jurisdiction under the *Alien Tort Claims Act*, Nigerian law applied, and dismissal is warranted under the doctrine of *forum non conveniens.*

It is encouraging that the District Court commented on *forum non conveniens* in the *Talisman* case which was decided after *Pfizer*. The Second Circuit cautioned that ATCA courts should grant dismissal in "rare instances," and "the plaintiff's choice of forum should rarely be disturbed."[263] A two step analysis is required in assessing whether or not a dismissal based on *forum non conveniens* should be granted:[264]

> First, the court must determine whether an adequate alternative forum exists. Second, if such a forum exists, the court must undertake a balancing test and weigh several factors involving the private interests of the parties and the public interests at stake. The test for *forum non conveniens* is not a simple matter of which side has the weightier argument. Instead, the burden is on the defendant to show that the factors tilt "strongly" in favor of trial in a foreign forum.

We may conclude that *forum non conveniens* under ATCA is different from its usual analysis in common law jurisdictions because ATCA requires a defendant to prove that "the factors tilt strongly in favour of trial in a foreign jurisdiction."[265]

Arguably, ATCA is useful because it provides redress for violations of human rights. The success of the individual parties in *Filartiga* and *Kadic* attests to its usefulness. By virtue of the ATCA "a foreigner who suffers…human rights injury outside the United States at the hands of an American corporation or a multinational corporation with business operations in the United States…may sue the corporation and its foreign business partners in U.S. courts."[266] The Talisman case and the other oil corporation cases discussed earlier show how ATCA has created a right of action against corporations.

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[263] *Supra* note 176.

[264] *Ibid.*

[265] *Ibid.* For a comparison of the application of *forum non conveniens* in Canada, see Chapter Four of this thesis.

[266] A. Rosencranz & R. Campbell, "Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts" (1999) 18 Stan. Envtl. L.J. 145 at 146.

Also, the negative publicity generated by the ATCA cases sends signals to corporations. Talisman pulled out of Sudan due to the publicity generated by the *Talisman* case.[267] The withdrawal of Talisman from Sudan may be regarded as victory for human rights over economic interests. But the Chinese National Petroleum Corporation (CNPC) has replaced Talisman and CNPC has acquired the single largest share (40%) in Greater Nile Petroleum Operating Company, which dominates Sudan's oil fields.[268] There are allegations that the Sudanese government funds the civil war in Sudan with money generated from the sale of Sudanese oil.[269] The people of Sudan might not be better off because it may be a case of one corporation replacing another without tangible improvement on the situation in Sudan. This emphasizes the need for concerted efforts towards fighting corporate violations of human rights.

The limitations of ATCA are also obvious. With respect to corporate violations of human rights, there is no room for a successful suit. A plausible reason is that generally, corporations do not commit *jus cogens* violations such as torture, genocide and war crimes. ATCA will only become useful for combatting corporate violations if international law articulates some type of legal regulation of transnational corporations. ATCA only enforces binding international norms. Therefore, the articulation of international corporate regulation will provide sufficient binding laws for ATCA to enforce against corporations.

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[267] "Talisman Pulls Out of Sudan" *BBC News* (10 March 2003) online: BBC News <http://news.bbc.co.uk/2/hi/business/2835713.stm>

[268] Peter Goodman, "China Invests Heavily in Sudan's Oil Industry", Energy Bulletin online: <http://www.energybulletin.net/node/3753>

[269] *Ibid.*

CHAPTER THREE

JURISDICTION OF CANADIAN COURTS OVER TRANSNATIONAL TORT CLAIMS

3.1 INTRODUCTION

This chapter explores the jurisdiction of Canadian courts over transnational torts. It uses the facts of the Talisman case[270] to analyze the likely outcome of that lawsuit if the plaintiffs had sued Talisman, a Canadian corporation, in Canada. Canada has no provision similar to ATCA. This explains why the plaintiffs chose to sue in the United States. This chapter considers the likely chances of success of the Talisman case in Canada.

It discusses the right of action by plaintiffs ["Presbyterian Church" or "Plaintiffs"] in the Talisman Case to sue in Canada, over torts committed outside Canada. It also evaluates the right of the Presbyterian Church to sue Talisman over alleged torts committed by Talisman's subsidiary and assesses whether Presbyterian Church can establish that Talisman's alleged conduct amounts to a tort.

It could be argued that Talisman might be liable for a variety of torts. For the purposes of this chapter, I will focus on the tort of conspiracy to commit human rights violations, which is the only tort that might be established on the facts of the Talisman case. However, the discussion of even the potential tort liability of Talisman illustrates the response of the Canadian legal system to transnational torts in general.

Although the Canadian legal system recognizes the tort of conspiracy, and has applied it to commercial transactions and family law, conspiracy to commit human rights violations is not recognized in the Canadian legal system. This chapter discusses the Canadian position on the tort of conspiracy and argues that although a Canadian court can extend its application to conspiracy to commit human rights violations, it is unlikely that the courts would do so in our hypothetical case.

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[270] The facts of the *Talisman* case are set out in Section 3.2 of this chapter.

3.2 JURISDICTION OF CANADIAN COURTS OVER TRANSNATIONAL TORTS

A Canadian court may exercise jurisdiction over a corporation on the basis that the corporation carries on business in Canada.[271] "The presence of the defendant in the territory of the forum has consistently been held at common law to be an independently sufficient basis for jurisdiction."[272] This has been referred to as "jurisdiction as of right"[273] Such jurisdiction may relate to claims that arose from business conducted outside Canada, although this is subject to the court's discretion to decline jurisdiction on the basis that there is clearly a more appropriate forum for the determination of the rights and obligations of the parties. Therefore, a plaintiff may sue a Canadian corporation in Canada over torts that occurred outside Canada. These torts are transnational torts.[274]

Canadian courts have jurisdiction over transnational torts whenever the courts possess jurisdiction *in personam* over the defendants. A court exercises jurisdiction *in personam* where a plaintiff seeks monetary judgment against a defendant resident in the jurisdiction or an order directing the defendant to do or refrain from doing something.[275]

The decision by a Canadian court on whether to exercise jurisdiction over transnational torts involves the consideration of judicial jurisdiction.[276] Judicial jurisdiction in the conflict of laws is the authority of a court to determine an issue in a case involving a legally relevant foreign element.[277] Canadian courts can adjudicate claims for transnational torts by the Presbyterian Church against Talisman because Talisman is a Canadian corporation over which Canadian courts have jurisdiction *in*

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[271] See Janet Walker, *Canadian Conflict of Laws*, 6th ed. (Markham: LexisNexis, 2005) at 11-7 [Janet Walker]. In Quebec, for instance, article 3134 provides that Quebec authorities have jurisdiction over any defendant domiciled in Quebec provided there is no special provision that indicates otherwise.

[272] *Ibid.*

[273] *Ibid*

[274] *Ibid.*

[275] *Ibid.* at 11-2

[276] *Ibid.* See chapters 11 and 35. Jurisdiction refers to "[a] court's power to decide a case or issue a decree - See ***Black's Law Dictionary***, 8th ed., *s.v.* "jurisdiction" [Black's Law Dictionary]. Jurisdiction has also been defined as '"the power of the court to hear a particular matter" – *The Dictionary of Canadian Law*, 3rd ed., *s.v.* "jurisdiction". See also *Tolofson v. Jensen* (1992), 9 C.C.L.T. (2d) 289 at 293, 4 C.P.C. (3d) 113, 65 B.C.L.R. (2d) 114.

[277] *Ibid.* at 11-1.

personam. For the purposes of this thesis, I will explore whether Presbyterian Church may sue Talisman in Canada for the tort of conspiracy to commit human rights violations. The facts of the Talisman case are set out hereunder.

In *Presbyterian Church of Sudan v. Talisman Energy Inc.* the plaintiffs sued Talisman Energy, a Canadian corporation, for conspiracy with the government of Sudan to commit acts of genocide, enslavement, torture, rape, and other human rights violations.[278] Plaintiffs alleged that Talisman aided and abetted the government of Sudan to commit these human rights violations because of Talisman's interest in Sudanese oil. Talisman's interest in Sudan consisted of a 25% share interest in Greater Nile Petroleum Operating Company [Greater Nile].[279] The Sudanese government granted concessions to Greater Nile to explore for and extract oil from certain blocks in Southern Sudan. Talisman acquired its interest in Greater Nile through Talisman (Greater Nile) BV, a wholly owned Dutch subsidiary of Talisman. Talisman did not conduct operations directly in Sudan but the plaintiffs alleged that Talisman directed and coordinated the oil operations through its senior officers. Talisman agreed that Greater Nile is its subsidiary but argued that it is not liable for torts committed by its subsidiary. Talisman filed a motion for the dismissal of the suit on the ground that it did not raise a cause of action, but the District Court ruled that the plaintiffs alleged enough facts for which Talisman may be held directly liable.

After discovery in the United States and Canada, Talisman filed a motion for summary judgment, which was granted.[280] The District Court held that the plaintiffs did not identify "sufficient evidence to raise a material question of fact that Talisman can be found liable for aiding and abetting" the government of Sudan to commit war crimes and other human rights violations.[281] There was no evidence that Talisman "performed any act that could be construed as substantial assistance to the Government in its violation of international law."[282]

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[278] 244 F. Supp.2d 289 (S.D.N.Y. 2003).

[279] *Ibid.* See also *Presbyterian Church of Sudan v. Talisman Energy Inc.* [2005] A.J. No. 1808, 2005 ABQB 920 at para 9 where the New York court made a request for international judicial assistance to the Alberta Court of Queen's Bench. This was to enable the plaintiffs conduct discoveries on certain documents of Talisman Energy in Canada.

[280] 453 F. Supp.2d 633 (S.D.N.Y. 2006).

[281] *Ibid.* at 668.

[282] *Ibid.*

The Talisman case clearly shows an effort by the plaintiffs to link the actions of Talisman's subsidiary to the parent corporation. Usually, allegations of human rights violations against transnational oil corporations involve the direct actions of the host state and an indirect liability on the part of the corporation due to alleged conspiracy or aiding and abetting.

The issue is how a Canadian court might handle a similar suit. Based on the above facts, Talisman is likely to raise preliminary objections to a Canadian action on three grounds. First, the tort of conspiracy to commit human rights violations is not recognized in Canada. Second, the Presbyterian Church of Sudan is trying to hold Talisman liable for alleged torts committed by Talisman's subsidiary, which is indirect liability and is against the entrenched principle of corporate personality. Third, even if the Canadian court holds that Talisman is responsible for torts committed by its subsidiary and if the tort of conspiracy to commit human rights violation is known to Canadian law, the court should decline jurisdiction because of *forum non conveniens.* The first two objections raise questions of substantive law and will be discussed in this chapter. Chapter Four will focus on the principle of *forum non conveniens.*

3.3 CORPORATE LIABILITY FOR TORTS

It is pertinent to evaluate the circumstances in which a corporation can be liable in tort. "Where a corporation actively participates in a tort, it is not vicariously liable but rather is itself personally liable for the wrongdoing concerned."[283] A corporation may incur primary liability in tort where the "corporation authorizes or directs the commission of a tort".[284] However, Plaintiff's claim is not that Talisman authorized or directed the violation of its rights: the allegation is that Talisman conspired with the Sudanese government to violate Plaintiffs' human rights. This raises the question whether a corporation can engage in conspiracy to commit human rights violations. Because this tort is not recognized in Canada, the next section considers the tort of conspiracy in general and concludes that it is unlikely that a Canadian court might extend its application to human rights cases.

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[283] Kevin McGuinness, *Canadian Business Corporations Law*, 2nd ed. (Markham: LexisNexis Canada Inc., 2007) at 105 [McGuinness]. See also Anthony VanDuzer, *The Law of Patnerships and Corporations*, (Concord: Irwin Law, 1997) at 151 [VanDuzer].

[284] *Ibid.*

3.4 TORT OF CONSPIRACY

The tort of conspiracy is generally an economic tort because it deals with an intentional tort in respect of economic interest, although liability may also result from non-economic interest.[285] Conspiracy applies in circumstances where "the act which causes damage would not be actionable if done by one alone."[286] The tort usually applies to combination in trade or commercial circumstances that cause oppression.[287]

In *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, Estey J. laid down the rule guiding the Canadian tort of conspiracy.[288] The principle is that civil conspiracy applies where: (1) the predominant purpose of the defendants' conduct is to cause injury to the plaintiff either through lawful or unlawful means; or (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants know that in the circumstances, injury to the plaintiff is likely to and does result.[289] "Unlawful means" include actions that "are criminal or tortious in character."[290]

In Canada, there is "judicial reluctance to extend the scope of the tort [of conspiracy] beyond the commercial context", but Wilson J. held in *Hunt v. Carey Canada Inc.* that she did not consider that the Supreme Court of Canada "has ever suggested that the tort could not have application in other contexts."[291] The Court held that it would be highly inappropriate to deny a litigant "who is capable of fitting his allegation into Estey J.'s two pronged summary on the law of civil conspiracy the opportunity to persuade a court that the facts are as alleged, and that the tort of conspiracy should be held to apply to ...[those] facts."[292] The court observed that such proof will involve complex arguments and submissions to prove that the Appellants in that case either conspired to cause injury to the Respondent, or the circumstances were such that the Appellants should have known that their actions would cause harm to the Respondent.[293]

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[285] Anthony Dugdale & Michael Jones, ed., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1492 [Clerk & Lindsell].

[286] *Midland Bank Trust Co.Ltd. v. Green* [1982] Ch. 529 at 539 (*per* Lord Denning).

[287] *Ibid.*

[288] 24 C.C.L.T. 111 (S.C.C.), (1983), 145 D.L.R. (3d) 385 at 398-399.

[289] "Presumed malice", "malice in law" or "even actual malice could be established against a corporation." - Douglas Harris *et al.*, *Cases, Materials and Notes on Partnerships and Canadian Business Corporations*, 4th ed. (Toronto: Carswell Thomson, 2004) at 145 [Douglas Harris].

[290] See *Rookes v. Barnard* [1964] A.C. 1129 (*per* Lord Evershed at 1182 and *per* Lord Devlin at 1206) cited in *Clerk & Lindsell, supra* note 285 at 1506.

[291] *Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959. In that case, the Respondent sued a number of asbestos mining and manufacturing companies and alleged that the appellants conspired to withhold information on the dangerous effects of asbestos. The Respondent alleged that he was exposed to asbestos in the course of his employment and subsequently suffered mesothelioma. The Appellants brought an application for a strike out of the section of the Respondent's pleading alleging conspiracy. In the opinion of Wilson J., "the trial judge might conclude…that the plaintiff should have sued the

In *Helmy v. Helmy*, the Ontario Superior Court of Justice applied the tort of conspiracy to Family Law and awarded damages to a divorced wife for conspiracy by her ex-husband, together with his siblings, to deprive the ex-wife of the benefit of a lottery, won by the ex-husband, before their divorce.[294] Seppi J. held that "civil conspiracy requires an agreement between conspirators that results in damage or injury to the plaintiff."[295] Seppi J. cited with approval the case of *Sweeney v. Coote*[296] and held that "an agreement in the context of conspiracy is not used in the formal sense of a binding contract"; rather, "it is used in the sense of a joint plan or a common design to damage the plaintiff, without just cause or excuse."[297] The court may infer lack of just

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defendants as joint tortfeasors rather than alleging the tort of conspiracy." He did not rule out the right of a plaintiff to rely on the tort of conspiracy.

[292] *Ibid.*

[293] *Ibid.*

[294] [2000] O.J. No. 4456 (S.C.J.) [*Helmi*]. In that case, the plaintiff, an ex-wife of Mohamed Helmy commenced action against Mohamed for the recovery of one-half of the sum of $2,500,000 won by Mohamed during their marriage. Mohamed failed to disclose the lottery winnings during the family law action with the plaintiff. The court found that Mohamed conspired with his siblings to keep the winnings from the plaintiff. Mohamed's brother, Andrew collected the lottery winnings. A portion of the lottery winnings was transferred to Mohamed's sister, Foutna and the sum was meant to be held in trust by Foutna for Mohamed. Subsequently, Andrew conspired with his wife while Foutna conspired with her husband to cash the lottery winnings in their possession. An aggrieved Mohamed sued his siblings, and disclosed the lottery winnings to the plaintiff. The plaintiff then sued Mohamed, Andrew with the wife, and Foutna with the husband for the plaintiff's portion of the lottery winnings together with damages for civil conspiracy. The plaintiff recovered half the lottery winnings plus $50,000 as punitive damages for civil conspiracy.

[295] *Ibid.* at para. 89. See also *Thompson v. Thompson* [2003] A.J. No. 1577 and *M. (M.J.) v. M. (D.J.)* (2000) 187 D.L.R. (4th) 473 (Sask. C.A.).

[296] [1907] A.C. 221 at 222.

[297] *Helmi, supra* note 294.

cause or excuse from "proved facts where the facts are such that they cannot fairly admit of any other inference being drawn."[298]

It is patent that if Talisman actually conspired to cause injury to the Presbyterian Church, then Talisman must have realized that the alleged torts committed by the Sudanese government would cause harm to the Presbyterian Church. Under Estey J.'s two pronged approach, the Presbyterian Church not only has to prove that it suffered harm but also that Talisman had a predominant purpose to injure the Presbyterian Church. It is improbable that Talisman would conspire with the Sudanese government with a predominant purpose to injure the Presbyterian Church. It will require a stretch of the imagination to establish such conspiracy. The paramount interest of an oil corporation may be in its drilling contracts. Although funds generated from the sale of oil may have funded the war in Sudan, it would be difficult to establish that Talisman or even its subsidiary actually conspired with the government of Sudan, with a predominant purpose to injure the Presbyterian Church. The Presbyterian Church may rely on the statement of Wilson J. and argue that the courts may extend the tort of conspiracy to cover conspiracy to commit human rights violations. Canadian courts can extend or refine the common law and the Law of Torts derives from common law principles.[299] Nevertheless, the facts alleged by the Presbyterian Church and the effort to tie Talisman to the allegations are so strained and remotely connected that the courts will probably not feel it is the right suit to establish the tort of conspiracy to commit human rights violations in Canada.

If the Presbyterian Church had alleged that Talisman's guards smacked protesters or engaged in brutality in order to prevent access by the demonstrators into Talisman's office or installations in Sudan, there would have been a clear case of battery which is a recognized tort. The non-recognition of conspiracy to commit human rights violations shows how difficult it is for the Presbyterian Church to establish in Canada that Talisman committed a tort. The next section considers whether Talisman might be liable for the actions of its subsidiary.

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[298] *Ibid.*

[299] See *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130, *Dagenais v. CBC* [1994] 3 S.C.R. 835, *Retail, Wholesale and Department Store Union v. Dolphin Delivery* [1986] 2S.C.R. 573.

3.5 LIABILITY OF PARENT CORPORATION FOR THE ACTS OF ITS SUBSIDIARY

The disposition of common law jurisdictions on the liability of parent corporation for the acts of its subsidiary is deeply rooted in Company Law. In *Salomon v. Salomon & Co.* [*Salomon*] the House of Lords held that the company is at law a different entity from the subscribers to the memorandum or the shareholders.[300] A company is not the agent of its subscribers or shareholders merely because they are the incorporators of the company.[301] For the Presbyterian Church to establish Talisman's liability, there should be a link between the alleged tort and the conduct of Talisman sufficient for the court to pierce the corporate veil.[302] Essentially, Presbyterian Church has to establish some connection between the conduct of Talisman and any alleged tort committed by Greater Nile.

3.5.1 PIERCING THE CORPORATE VEIL

In some circumstances, the court may be prepared to pierce the corporate veil.[303] Piercing the corporate veil "is commonly used to describe situations in which judges have presumed to simply ignore the existence of the corporate person and fix liability on the managers or the shareholders."[304] This means that the court may disregard the existence of Greater Nile as a corporate entity and fix liability for Greater Nile's acts on

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[300] [1897] A.C. 22 (H.L.) [Salomon]. See also Douglas Harris, *supra* note 289 at 72.

[301] *Ibid.*

[302] Black's Law Dictionary defined "piercing the corporate veil" as "the judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." It added that "piercing the corporate veil" "is also termed disregarding the corporate entity".

[303] VanDuzer, *supra* note 283 at 95. VanDuzer referred to the expression, "piercing the corporate veil" as "somewhat antiquated and ultimately obscuring". Although the courts apply the doctrine of lifting the veil, many commentators criticize the doctrine because of the obscure method of its application, a lack of discernible approach and the vague meaning of the doctrine. In fact, the doctrine has been dismissed as a vivid but imprecise metaphor – *Re Poly Peck International plc*, [1995] B.C.C. 486 at 497 (Ch.), *per* Robert Walker J. Nevertheless, "the phrase and the concept to which it [piercing the corporate veil] relates are so entrenched in corporate law, that it is impossible now to move away from them" – McGuinness, *supra* note 283 at 47.

[304] Bruce Welling *et al., Canadian Corporate Law: Cases, Notes & Materials*, 3rd ed. (Toronto and Vancouver: Butterworths, LexisNexis Canada Inc., 2006) at 142. Black's Law Dictionary defined "piercing the corporate veil" as "the judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." It added that "piercing the corporate veil" "is also termed disregarding the corporate entity."

Talisman, its indirect shareholder and parent corporation.[305] The shareholding is indirect because Talisman only had shares in the Dutch corporation that owned Greater Nile.

The courts may disregard corporate personality to make an individual or corporate shareholder liable. Where a corporate shareholder is involved, the courts lift the veil to hold the corporate shareholder liable.[306] The corporate shareholder is a parent corporation if it owns the corporation whose veil is lifted.[307]

The court may disregard the separate existence of a company from its shareholders or subscribers by "piercing the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation.[308] The court's application of the doctrine follows no consistent principle.[309] In *Kosmopoulos v. Constitution Insurance Co. of Canada,* [*Kosmopoulos*] the Supreme Court of Canada cited Gower's Principles of Modern Company Law with approval and held: "The best that can be said is that the separate entities principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue."[310] It is difficult to define the words "too flagrantly opposed to justice" and it is even more complicated to predict when a court will act on this basis.[311] "One can say that the courts are likely to be more sympathetic to claims by third parties, such as creditors and tort victims, than by shareholders."[312]

For the court to pierce the veil, Presbyterian Church has to establish that there are circumstances that will foist injustice, if the court insists that Talisman and Greater Nile are completely distinct entities. It has been suggested the courts are more likely to lift the corporate veil if doing so results in liability being imposed on another corporation rather than an individual.[313] But McGuinness argues that the courts may pierce the corporate veil among other situations, when the court is satisfied that a company is a façade or alter ego, or where the company is an authorized agent of its controllers or shareholders.[314] Although there are other grounds for piercing the corporate veil, agency and the alter ego principles are the only grounds that relate to this work.

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[305] *Ibid.*

[306] See *De Salaberry Realities Ltd. v. M.N.R.* (1974), 46 D.L.R. (3d) 100 (F.C. T.D.). See also VanDuzer, *supra* note 283.

[307] *Ibid.*

[308] *Kosmopoulos v. Constitution Insurance Co. of Canada,* (1987), 36 B.L.R. 283, [1987] S.C.J. No. 2 (S.C.C.), [1987] 1 S.C.R. 2 [Kosmopoulos].

[309] See also Douglas Harris, *supra* note 289 at 110.

[310] *Ibid. per* Wilson J. Professor L.C.B. Gower is a prominent authority in Company Law. See also Paul Davies & D. Prentice, eds., *Gower's Principles of Modern Company Law,* 6th ed. (London: Sweet & Maxwell, 1997) at cap. 8.

[311] VanDuzer, *supra* note 283 at 96.

[312] *Ibid.*

3.5.1.1 CORPORATION AS FAÇADE OR ALTER EGO

Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be a sham, façade, front or the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability.[315] This principle applies "to prevent conduct akin to fraud that would otherwise unjustly deprive …claimants of their rights."[316]

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[313] *Ibid.* at 96. See also *De Salaberry Realities Ltd. v. M.N.R.* (1974), 46 D.L.R. (3d) 100 (F.C. T.D.). The court cited with approval the views of Gower and held: "Consideration of the cases in which the courts have treated a company as the agent of its controlling shareholder suggests that they are more ready to do so where the shares are held by another company. In other words, they are coming to recognize the essential unity of a group enterprise rather than the separate legal entity of each company within the group." See also Douglas Harris, *supra* note 289 at 129.

[314] McGuinness, *supra* note 283 at 47-66. He also recognized that the legislature may provide that the liability of a corporation be affixed on its shareholders – Ontario Business Corporations Act, s. 243(1). Where the court is construing a statute, it is patent that the court will apply a statutory provision even where case law such as *Salomon* holds otherwise. On the other hand, where a court is construing a contract, the court may only lift the veil of incorporation where a plaintiff establishes six requirements. These requirements as stated in *Smith, Stone & Kinight Ltd. v. Birmingham (City)* are "(1) were the profits of the subsidiary treated as the profits of the parent company? (2) were the persons conducting the business of the subsidiary appointed by the parent company? (3) was the parent company the head and brain of the subsidiary? (4) did the parent company govern the subsidiary, decide what should be done, and what capital should be risked on the company? (5) did the subsidiary company make profits by its own skill and direction? [and] (6) was the parent company in effective and constant control - 1939] 4 All E.R. 116 (Eng. K.B.). See also *International Trademarks Inc. v. Clearly Canadian Beverage Corp.* 1999 CarswellBC 96 at para 17-23, 47 B.L.R. (2d) 193, [1999] B.C.J. No. 117; *Sun Sudan Oil Co. v. Methanex Corp.* 1992 CarswellAlta 154 at para 34, 5 Alta. L.R. (3d) 292, [1993] 2 W.W.R. 154, 134 A.R. 1 [*Sun Sudan*]. These six requirements are cumulative. See also *Beazer East Inc. v. British Columbia (Assistant Regional Waste Manager)* 2000 CarswellBC 2372 at para 90, 2000 B.C.S.C. 1698, 84 B.C.L.R. (3d) 88, 36 C.E.L.R. (N.S.) 195, [2000] B.C.J. No. 2358.

[315] *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 at para 20 [Transamerica]. See also Lloyd Cadsby, "Personal Liability of Individuals for Breach of Trust in the Construction Industry" (2004) 37 C.L.R. (3d) 171.

[316] *Ibid.* See also the decision in *Air Canada v. M & L Travel Ltd.* (1993), 108 D.L.R. (4th) 592 at para 60 (S.C.C.) where the Supreme Court of Canada held that "…a relevant description of fraud [is] the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take." On that basis, the court held the defendant a constructive trustee for the plaintiff. Where an oil corporation uses substandard materials to conserve funds and pollution results from such activity,

Seemingly, a Canadian court will lift the veil to hold a parent liable for the acts of its subsidiary under this head where a plaintiff establishes that the parent organized the subsidiary in a manner aimed at defrauding the public.[317] The courts may also pierce the corporate veil where the parent deliberately organized the subsidiary to have insufficient capital to pay its debt.[318] Justice Sharpe has stated "...the courts will disregard the separate legal existence of a corporate entity where it is completely dominated and controlled [by its parent] and being used as a shield for fraudulent or improper conduct."[319] A parent corporation may also be liable for the acts of its subsidiary where the claimant proves that the parent and its subsidiary conduct themselves as if they are a single entity.[320] The Presbyterian Church's argument will be likely dismissed since there is nothing to show that Talisman uses Greater Nile as a means of avoiding just claims or that Greater Nile will not be able to pay damages if the Presbyterian Church had sued Greater Nile instead of Talisman.

3.5.1.2 AGENCY

Agency creates a legal fiduciary relationship whereby an agent is empowered to bind the principal and imposes a corresponding duty on the agent to act in the best interests of the principal.[321] For an agency relationship to exist, there has to be an agreement, which may be express, implied, or resulting from operation of law.[322] The agent owes a duty of loyalty or fiduciary obligation to the principal and the principal exercises control over the agent.[323] An agency relationship exists in one of three ways: (1) where the agent has actual authority, that is, where the principal expressly or impliedly authorizes the agent to act on the principal's behalf; (2) where the agent has

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arguably, a plaintiff may rely on this Supreme Court judgment and recover damages for torts suffered because of the acts of the oil corporation.

[317] *Ibid.*

[318] *Ibid.*

[319] *Ibid.* at para 22. In *B.G. Preeco (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* the British Columbia Court of Appeal found liability on the basis of fraud because the plaintiff was led to believe that the company which it dealt with had assets, which it did not - (1989) 37 B.C.L.R. (2d) 258.

[320] *R. v. CAE Industries* (1989), 20 D.L.R. (4th) 347 (Fed. C.A.). See also McGuinness, *supra* note 283 at 54.

[321] See William Klein and John Coffee, Jr., *Business Organization and Finance*, 9th ed. (New York: Foundation Press, 2004) at 15.

[322] *Ibid.* at 14-16.

[323] *Ibid.*

apparent or ostensible authority, that is, where the principal engages in conduct that leads a third party to reasonably believe that the agent has authority; or (3) inherent agency which covers situations where the agent neither possesses actual nor apparent authority.[324]

An agency relationship may result where Talisman expressly instructs its subsidiary to commit the alleged human rights violations. This would be most unlikely. The courts may also hold that an agency relationship exists if Talisman directs and supervises a transaction that results in alleged human rights violations.

For instance, assuming the Sudanese government granted an oil concession to Talisman's subsidiary and that Talisman seconded its employees to Sudan to execute the oil project. If Talisman gave instructions to and dominates its subsidiary in Sudan on how the project should be executed, the courts may find agency if human rights violations result from the execution of the project, especially if Talisman constantly monitored the project.

The Presbyterian Church would have to show that an agency relationship existed between Talisman and Greater Nile, regarding the alleged torts, which the court can categorize under actual, apparent or inherent agency.[325] A principal is liable for the torts committed by his agent acting within his authority.[326] This implies that a parent corporation may be liable for the torts of its subsidiary where an agency relationship exists and where the agent acts within the scope of its authority.

Canadian courts do not readily hold that an agency relationship exists between the parent and its subsidiary. In *Bank of Montreal v. Canadian Westgrowth Ltd.*, Brennan J. declined to find agency where the subsidiary was wholly owned by the parent; the directors and officers of the company were identical; meetings of the two boards were held simultaneously; the parent funded the subsidiary, and the subsidiary's assets were purchased with loans from the parent, interest free and with no repayment terms; the audits for both companies were done in Calgary by the same auditor, both firms had the same year end; the parent provided management services to the subsidiary at no cost; and most of the dealings as to the contract at issue were with the parent's staff in Calgary, addressed to the parent or on its letterhead, some of which contained language whereby the parent referred to its long term drilling contract.[327] Brennan J. considered these facts as "nothing more than what one would expect to find in the operation of two associated companies, especially where the one provided management services for the other."[328]

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[324] *Ibid.* at 15.
[325] *Ibid.*
[326] See Bowstead & Reynolds, *Bowstead & Reynolds on Agency*, (17th ed.) para 8-183 cited in *Clerk & Lindsell, supra* note 285 at 1093.

It appears that the test for the liability of parent for the acts of its subsidiary is more stringent where the plaintiff freely enters into a contract with the subsidiary and later tries to foist liability on the parent on the ground of agency.[329] It seems that the courts also weigh that in such transactions, the parties to the contract usually have the benefit of legal advice.[330] Therefore, if a plaintiff enters into a contract with the subsidiary, without any element of fraud or misrepresentation, the courts will rarely hold the parent liable for the acts of its subsidiary even where the subsidiary is completely under the control of the parent. The British Columbia Court of Appeal had stated that "[t]he use of a [subsidiary] company as a means of avoiding bearing business losses is neither unusual nor a basis for lifting the veil."[331]

In tort cases, the plaintiff neither consents to the torts nor is there a contract between the parties. It is probable that if the facts in *Bank of Montreal v. Canadian Westgrowth Ltd.* were to occur in a tort case, the courts may hold the parent liable for the acts of its subsidiary on the ground of agency. The close relationship in decision making between the parent and the subsidiary makes it difficult for the parent to rebut that it authorized the tort. Academic commentators have occasionally raised the question of whether the courts will be more willing to pierce the corporate veil in the case of involuntary creditors, such as the victims of a tort, which does not arise out of a pre-existing contractual relationship between the corporation and the victim.[332] A tort victim usually has no choice over who causes injury to him, and does not voluntarily deal with the tortfeasor.[333] Nevertheless, the allegations by the Presbyterian Church seem too remote for the court to pierce the corporate veil. Although silence in the face of human rights violations committed because of business interests may be morally reprehensible, the court will consider legal issues in determining the rights of the parties. For instance, there is nothing to show that either Talisman or Greater Nile knowingly assisted or conspired with the Sudanese government to commit human rights violations. From a legal point of view, it does not seem there is the reasonable likelihood that Presbyterian Church will convince the court to lift the corporate veil.

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[327] (1990), 72 Alta. L.R. (2d) 319, 102 A.R. 391 (Q.B.). See also *Sun Sudan, supra* note 314 at para 40.

[328] *Ibid.* at 327 (Alta L.R.).

[329] See *Sun Sudan, supra* note 314.

[330] *Ibid.* at para 52.

[331] *B.G. Preeco (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 37 B.C.L.R. (2d) 258.

[332] McGuinness, *supra* note 283 at 61. See also Henry Hansmannt & Reinier Kraakman, "Towards Unlimited Shareholder Liability for Corporate Torts" (1991) 100 Yale L.J. 1897; *Biggs v. James Hardie & Co. Pty. Ltd.* (1989), 7 A.C.L.C. 841 (N.S.W.C.A.), *per* Rogers A.J.A.

3.6 CONCLUSION

The account shows that on the facts of the Talisman case, it would be extremely difficult for the Presbyterian Church to establish a cause of action in civil conspiracy to commit human rights violations against Talisman. It is worthwhile to summarize the obstacles to the hypothetical Presbyterian Church lawsuit in order to provide a template for future cases, which might have a stronger evidentiary foundation. These are not easy hurdles for the Presbyterian Church and based on the facts alleged by the Presbyterian Church, it is likely that Talisman's preliminary objections will succeed.

Canadian courts possess jurisdiction over transnational torts. The Presbyterian Church may bring an action in Canada against Talisman since it is a Canadian corporation. To maintain such a suit against Talisman, Presbyterian Church has to persuade the court to recognize the tort of conspiracy to commit human rights violations and also establish the liability of parent corporation (Talisman) for torts committed by its subsidiary (Greater Nile) by connecting Talisman to the alleged torts committed by its subsidiary. Without evidence of direct acts by Talisman, it is difficult to convince the court to pierce the corporate veil because the Presbyterian Church has to show why it sued Talisman instead of its subsidiary. There is also no evidence that Greater Nile does not have the funds to pay, in the event that a court awarded damages in favour of Presbyterian Church.

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[333] See McGuinness, *supra* note 283 at 61.

CHAPTER FOUR

VENUE AND *FORUM CONVENIENS*

4.1 INTRODUCTION

Having discussed the right of an aggrieved claimant to commence proceedings in Canada against a Canadian corporation for torts committed outside Canada and specifically the right of the Presbyterian Church of Sudan to sue Talisman in Canada, this chapter discusses the appropriate place or venue in Canada to institute the action. It will first deal with the question of venue and then focus on the issue of *forum non conveniens*.

4.2 VENUE

Venue is "the proper or a possible place for a lawsuit to proceed, usually because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant."[334] Talisman is a Canadian corporation with its corporate headquarters in Calgary, Alberta. The Alberta Rules of Court is silent on the venue where a plaintiff may commence his claim.[335] However, Alberta courts have decided the issue in a number of cases. In *R.F.B. v. T.L.B* the court held that the claimant "has the right to set the venue where he thinks proper so long as he has not done so capriciously."[336] If Talisman is not satisfied with the Plaintiffs' choice of venue, the court may transfer the venue of the lawsuit to another judicial district.[337]

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[334] ***Black's Law Dictionary***, 8th ed., *s.v.* "venue".

[335] ***Royal Trust Corporation of Canada v. Fillo*** (1981), 17 Alta. L.R. (2d) 283, 34 A.R. 174 (Q.B.). Nevertheless, ***Rule 12 of the Alberta Rules of Court*** provides that "the Court may at any time direct that all proceedings in any action be transferred to the office of the clerk of any other judicial district and thenceforward the proceedings shall be instituted and continued in the other judicial district.

[336] (1990), 105 A.R. 67 at 69-70. Brownlee J. cited with approval the case of ***Wade Investments Ltd. v. Hat Travel Ltd.*** (1980) 21 A.R. 454.

[337] ***Ibid.*** Usually the question turns on the balance of convenience, including the number and residence of witnesses, the respective distances from the place of trial and other factors." – See ***Oliver v. Oliver*** [1997] A.J. No. 1053. Other factors considered by the court in the determination of the appropriate venue are the residence of the parties and the number and expense of witnesses required to travel to the judicial district where Smart commenced his claim - See ***Silver Springs Oil Recovery v. UMA Eng.*** (No.2) 2004 Alta. QB 942. The plaintiff is required in his statement of claim to name the place where he proposes for the court to try the action. - See ***Rule 237(a) Alberta Rules of Court.*** The venue to be named by the plaintiff for trial should be the judicial district "where the cause of action arose and the parties reside" or where a corporation is involved, it becomes where the corporation carries on business. See ***Rule 237(b) Alberta Rules of Court.*** Since the lawsuit is on transnational tort and the cause of action did

Because Talisman transacts business in Calgary, Plaintiff may clearly institute an action in Calgary. The next segment considers the important question of possible limitations on the Plaintiffs' choice of forum.

4.3 *FORUM NON CONVENIENS*

Forum non conveniens means "that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place."[338] The courts have the discretion to decline jurisdiction on the basis that there is a more convenient forum.[339]

With the advent of globalization and the growth of transnational businesses, the courts have on numerous occasions, been burdened with the responsibility of determining the rules applicable to a litigant's choice of forum.[340] In some situations, a court may exercise jurisdiction over a cause of action that originated in another country[341] and litigants do not always have to commence a claim in the jurisdiction where the cause of action arose.[342]

Relating this to the hypothetical Talisman Case, the Plaintiffs' allegation is that Talisman, a Canadian corporation committed transnational torts in Sudan by conspiring with the Sudanese government to commit acts of genocide, enslavement, torture, rape and other human rights violations. Talisman will most likely raise an objection that the events that gave rise to the claim occurred in Sudan, rather than in Canada and that Alberta is not the appropriate jurisdiction for the Presbyterian Church claims. It is necessary to consider the evolution of the doctrine of *forum non conveniens* for a proper

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not arise in Canada, Edmonton may be the most likely place of trial because Pfizer is registered and transacts business in Edmonton.

[338] *Black's Law Dictionary*, 8th ed., *s.v.* "*forum non conveniens*".

[339] For a discussion on jurisdiction in actions *in personam*, see Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, 5th ed. (Markham: LexisNexis, 2004) at 11.9 [Castel].

[340] See *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, 1993) 102 D.L.R.(4th) 96 (S.C.C.) [*Amchem*], *Antares Shipping Corporation Ltd. v. The Ship Capricon*, (1976) 65 D.L.R. (3d) 105, [1977] 2 S.C.R. 422 [*Antares*].

[341] *Impulsora Turistica de Occidente, S.A. de C.V. v. Transat Tours Canada Inc.*, 2007 SCC 20, *Garrett Estate v. Cameco Corp.* 151 Sask. R. 86, [1997] 10 W.W.R. 393, 1996 CarswellSask 805.

[342] *Ibid.*

appraisal of the likely course to be taken by the Alberta courts in the hypothetical lawsuit.

4.3.1 CANADIAN JURISPRUDENCE ON *FORUM NON CONVENIENS*

The doctrine of *forum non conveniens* was first considered by the Supreme Court of Canada in the case of *Antares Shipping Corporation Ltd. v. The Ship Capricorn* [*Antares*].[343] In that case, the appellant plaintiff (Antares Shipping - a Liberian corporation) claimed against the defendant respondents (the Ship Capricorn and two Liberian companies – Delmar Shipping Limited and Portland Shipping Company) the ownership of a vessel (the Ship Capricorn) arrested in a Canadian port.[344] The Ship Capricorn was a ship of Liberian registry. The warrant of arrest was issued at the instance of the appellant plaintiff, which claimed ownership of the ship. The appellant claimed that it purchased the ship from Delmar, a Liberian corporation, after negotiations between the appellant's Italian brokers and Delmar's English brokers. Appellant alleged that it entered into a three-year charter of the ship, which required it to deliver the ship to the charterer between July 15, 1973 and August 30, 1973.

Delmar claimed that it withdrew the ship from the market and sold it to Portland, a Liberian corporation. The bill of sale was registered in the United States on June 5, 1973. The ship sailed on the high seas, en route Quebec, where it was arrested on June 7, 1973.

The Supreme Court of Canada observed that a state should not exercise jurisdiction over a lawsuit where the state "is a seriously inconvenient forum", provided the plaintiff has a more convenient forum to institute action.[345] The selection of the appropriate forum depends on the facts of the case. The Supreme Court said that United States' law or English law should govern the contract but that either forum would cause "inconvenience to one or more of the parties."[346]

Antares involved the interest of parties from three countries – Liberia, England, and the United States – together with Canada, because the ship was arrested in

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[343] *Antares, supra* note 340.

[344] *Ibid.*

[345] *Ibid.*

[346] *Ibid.* at 448-449, 454.

Quebec.[347] The choice of appropriate forum was fundamental to the assumption of jurisdiction because each of the four countries had some connection to the lawsuit. Liberia had jurisdiction *in personam* over the parties; Canada had a connection to the lawsuit because the ship, the subject matter of the litigation, was arrested in Canada (jurisdiction *in rem*); the United States registered the bill of sale of the ship, which establishes a connection to the applicable law; and the transaction involved an English shipbroker.[348] The Court held that the case was sufficiently connected to Canada because the defendants posted a bond in the Federal Court, which served as "…the only fund now available anywhere to respond to a judgment" against the defendants.[349] Ritchie J. held that the test for the appropriate forum should be "that forum which is the more suitable for the ends of justice".[350]

After the *Antares* case, the Alberta Court of Appeal had the opportunity to consider the *forum non conveniens* test in *United Oilseed Products Limited v. Royal Bank of Canada.*[351] In that case, the plaintiff alleged that the Royal Bank, the defendant, provided inaccurate information to the Winnipeg branch of the plaintiff's bank. The information concerned the affairs of a customer of the plaintiff. The customer was a company, incorporated under the laws of Ontario and had its office there. None of the customer's officers was resident in Alberta but some were resident in Ontario and the customer had no office in Alberta. The documents of the customer were in the hands of an Ontario receiver because the customer was bankrupt.

The defendant intended to add the customer's estate as a third party to the suit. Most of the defendant's employees who were familiar with the suit were resident in Ontario but none was resident in Alberta. The dealings between the customer and Royal Bank were presumably based on communications that originated in Alberta. The plaintiff is a company incorporated in Alberta and it maintained its records in Lloydminster, Alberta. The employees and officers of the plaintiff resided in Alberta. The request for information originated in Alberta, but the Royal Bank provided the information to the plaintiff's bank in Manitoba.

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[347] *Ibid.*

[348] See Castel, *supra* note 339 at caps 11-13.

[349] *Antares, supra* note 340 at 455.

[350] *Ibid* at 453.

[351] [1988] 5 W.W.R. 181 (Alta. C.A).

Plaintiff commenced the suit in Alberta. The Alberta Court of Queen's Bench ruled in an oral judgment that it had jurisdiction over the suit. The Royal Bank appealed to the Alberta Court of Appeal, seeking an order to stay or strike out the suit on the ground that Alberta was not the proper forum.[352]

Stevenson J.A. held that the court would not confer special status on a plaintiff's choice of forum unless that forum has jurisdiction as of right.[353] He further observed that "Even where that jurisdiction exists as of right we should recognize that there may be a superior forum, having regard to the interests of both parties. Where that superior forum can be readily identified, litigation should be pursued in it."[354]

On the issue of identification of the superior forum, Stevenson J.A. concluded, "The test to be applied in all cases where there is an issue of determining the appropriate forum is that of *forum conveniens,* the forum which is more suitable for the ends of justice."[355] This is a clear adoption of the test in the *Antares* case. The court stated, "Where a forum possesses jurisdiction over a defendant as of right, the defendant must show that there is another available forum which is clearly or distinctly more suitable."[356]

The court considered that the relative advantages and disadvantages of each forum were matters of cost and inconvenience, but that the problem of third-partying the customer's estate in this suit was a factor for consideration. The court weighed the other factors and found that the customer had its banking relationship with the defendant in Ontario, the misstatement originated in Ontario, all of the records and witnesses of the defendant were in Ontario, the customer's trustee and all of its records were in Ontario. Evidence relating to the customer's creditworthiness originated from Ontario. The plaintiff's documents and its witnesses were in Alberta and plaintiff relied on the misstatement in Alberta. The court found that the relative inconvenience and expense favoured Ontario as "clearly and distinctly the more suitable forum."[357] The court stayed proceedings to enable the plaintiff institute action in Ontario.

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[352] *Ibid.*
[353] *Ibid.*
[354] *Ibid.*
[355] *Ibid.*
[356] *Ibid.*
[357] *Ibid.*

The peculiar facts of each case determine the factors which Canadian courts will consider before arriving at the appropriate forum for litigation. The court assesses all jurisdictions likely to serve as forum for a case and objectively determines the most appropriate forum based on the preponderance of evidence put forward by a defendant, challenging the forum where the plaintiff commenced the lawsuit.[358] Where the defendant is unable to establish that its proposed forum is more convenient, the conclusion of Stevenson J.A. suggests that the plaintiff gets the benefit of the doubt and the suit will proceed in the plaintiff's chosen forum.

The most extensive review of the Canadian doctrine of *forum non conveniens* is embedded in the judgment of Sopinka J. in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* [*Amchem*].[359] In that case, residents of British Columbia sued some American asbestos manufacturing companies in Texas because they suffered injury to health in Canada, due to exposure to asbestos.[360] Plaintiffs claimed that the respondent asbestos companies manufactured various products containing asbestos. They alleged that these companies failed to issue warnings on the dangers of asbestos and the companies allegedly conspired to suppress knowledge of such dangers. The British Columbia Workers Compensation Board was subrogated to the plaintiffs because it paid disability and death benefits to workers affected by exposure to asbestos.[361]

None of the defendants was incorporated in Texas but most manufactured asbestos in Texas and carried on business there. Some of the defendants maintained their corporate headquarters at various times in Texas together with their principal asbestos manufacturing facilities. Most of the corporate defendants challenged jurisdiction and venue and alleged they were *forum non conveniens*. The Texas court ruled on the applications and found that Texas was the appropriate jurisdiction and venue. The defendants alleged that they did not appeal the ruling because under Texas laws, rulings on jurisdiction can only be appealed after trial.

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[358] *Ibid.*
[359] 1993 CanLii 124 (S.C.C.), [1993] 1 S.C.R. 897.
[360] *Ibid.*
[361] *Ibid.*

None of the defendants had any connection with British Columbia. Amchem and the other defendants brought an application for an anti-suit injunction in British Columbia and argued that British Columbia was a more appropriate forum than Texas.[362] The Supreme Court of British Columbia granted the anti-suit injunction in order to prevent the continuation of the Texas lawsuit. The Texas court then granted an anti-anti-suit injunction to prevent the defendants from seeking further anti-suit injunction in British Columbia. The plaintiffs in the Texas case appealed to the Supreme Court of Canada against the British Columbia anti-suit injunction.

The Supreme Court found that the suit had sufficient connection with Texas and the Texas court exercised its discretion properly and in a manner consistent with Canada's rules of private international law relating to *forum non conveniens*. The Supreme Court stated that all the asbestos companies (the defendants in the Texas suit) had some connection with Texas and some had substantial connection. Some of the corporations maintained their corporate headquarters or had manufacturing facilities in Texas. None of the defendants had any connection with British Columbia. No state in the United States was clearly more appropriate than Texas because the defendants were incorporated in different states in the United States. The action that gave rise to the claims (manufacture of defective asbestos products) occurred in the United States. Plaintiffs commenced action in the United States and the Texas court had fixed a trial date. Though the plaintiffs in the Texas suit suffered harm in Canada, their selection of Texas for litigation could be justified on the basis that no other jurisdiction was clearly more appropriate. The Supreme Court seized the opportunity to among other things, review *forum non-conveniens* and forum shopping.

The Supreme Court of Canada held "…a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides".[363] The precise meaning of "real and substantial connection" may be contentious but it appears that the phrase suggests some connection sufficient for a Canadian court to assume jurisdiction under conflict of laws. Joost Blom and Elizabeth Edinger view the phrase as a comparative test and are of the opinion that "the task of the judge is to assess whether the totality of the connections with a particular legal system outweigh the totality of the connections with any other legal system."[364] In this exercise, each connection is to be given its due weight but exactly how the connections are to be weighed against each other is left undefined.[365]

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[362] *Ibid.*

[363] *Ibid.* at 920. See also *Moran v. Pyle National (Canada) Ltd.* [1975] 1 S.C.R. 393 [*Moran*]. In *Moran*, the widow and children of a man who was electrocuted while changing a light bulb in a building in Saskatchewan sued the manufacturer for negligence and relied on the Fatal Accidents Act. The defendant/respondent was registered in Ontario and had neither asset nor an office in Saskatchewan. The Respondent's products were manufactured outside Saskatchewan and sold to distributors. The Supreme Court held that Saskatchewan had jurisdiction over the suit, applied the real and substantial connection test and reasoned that "where harm was suffered in one state as a direct result of the careless manufacture

Sopinka J. clarified:

> The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate. I recognize that there will be cases in which the best that can be achieved is to select an appropriate forum. Often, there is no one forum that is clearly more appropriate than others.[366]

Before the *Amchem* case, Elizabeth Edinger observed, "A conflict case seldom has a 'natural forum'."[367] Sopinka J.'s statement that "Often, there is no one forum that is clearly more appropriate than others" affirms Edinger's opinion and also implies that there may be other considerations in the determination of the appropriate forum. Castel and Walker suggest:[368]

> The question is not just whether there is a sufficient connection between the subject matter of the action or the parties and the forum, or whether the plaintiff is abusing its process, or whether granting the

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of a product in another the question of the situs of the tort was to be determined by reference to the following rule: where a foreign defendant carelessly manufactured in a foreign jurisdiction a product which entered into the normal channels of trade, and where the manufacturer knew or ought to have known not only that by his carelessness a consumer might be injured but also that it was reasonably foreseeable that the product would be used or consumed where the plaintiff in fact used it, then the forum in which the damage occurred was entitled to exercise judicial jurisdiction over that foreign defendant." See also *Morguard Investments Limited v. De Savoye* [1990] 3 S.C.R. 1077 which applied the real and substantial connection test.

[364] Joost Blom & Elizabeth Edinger, "The Chimera of the Real and Substantial Connection Test" (2005) 38 U.B.C. L. Rev. 373.

[365] *Ibid.*

[366] *Amchem, supra* note 340.

[367] Elizabeth Edinger, "The MacShannon Test for Discretion: Defence and Delimitation" (1986) 64 Can. Bar Rev. 283 at 293.

[368] Castel, *supra* note 339 at 13.2.

> relief sought by the defendant would deprive the plaintiff of a legitimate personal or juridical advantage …in the chosen forum. The question is whether the forum is an inconvenient, *i.e.*, inappropriate forum in the sense that there is clearly a more appropriate forum elsewhere for the pursuit of the action and for securing the ends of justice.

If the forum that secures the 'ends of justice' is to serve as the proper test, then justice admits a whole number of factors and leaves a wide discretion to judges to determine an appropriate forum, based largely on the facts and circumstances of each case, rather than on some generalized proposition or test. The *Antares* case applied the "ends of justice" test but *Amchem* laid down the "real and substantial connection" test. Arguably, the extent of the required connection is still hazy.

In *Tolofson v. Jensen* La Forest J. stated that "individuals need not in enforcing a legal right be tied to the courts of the jurisdiction where the legal right arose, but may choose one to meet their convenience."[369] He was of the opinion that such flexibility "fosters mobility and a world economy."[370]

La Forest J. observed that in Canada, the test for "extraterritorial and transnational transactions" is whether there is a "real and substantial connection" between Canada and the subject matter of the suit and even conceded that the term "real and substantial connection" is yet to be defined.[371] In his words, "this test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest."[372] La Forest J. cited with approval the *Amchem* case and affirmed, "Through the doctrine of *forum non conveniens* a court may refuse to exercise jurisdiction where…there is a more convenient or appropriate forum elsewhere."[373]

Arguably, the prevention of forum shopping is the most influential factor in the evolution of the doctrine of *forum non conveniens*. Forum shopping is:

> [t]he practice of choosing the most favourable jurisdiction or court in which a claim might be heard. A plaintiff might engage in forum shopping, for example, by filing suit in a jurisdiction with a reputation

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[369] 1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110.

[370] *Ibid.*

[371] *Ibid.*

[372] *Ibid.*

[373] *Ibid.*

> for high jury awards or by filing several similar suits and keeping the one with the preferred judge.[374]

In *Amchem*, the Supreme Court of Canada said that "If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping."[375] Lord Denning M.R. made a most scathing attack on the practice of forum shopping when he said:

> As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side. The lawyers there will conduct the case "on spec" as we say, or on a "contingency fee" as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40% of the damages, if they win the case in court, or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such cost deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40% before the plaintiff gets anything. All this means that the defendant can readily be forced into a settlement. The plaintiff holds all the cards.[376]

Justice clearly requires that no party should hold all the cards. A plaintiff will likely choose a jurisdiction where he thinks he will most favourably present his case. This should not be of surprise to any court because arguably, a defendant who objects to the jurisdiction of any court does so because he thinks that his case will be more favourably presented in another jurisdiction. If the court grants a stay in a hurry because forum shopping should be discouraged, the court might inadvertently favour a defendant that resides or carries on business within the court's jurisdiction. Apart from forum shopping, there is also the requirement that the plaintiff's choice of forum should be the jurisdiction with the closest connection to the action and the parties.[377]

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[374] *Black's Law Dictionary*, 8th ed., *s.v.* "forum shopping".

[375] See *Amchem, supra* note 340 at 920 (*per* Sopinka J).

[376] *Smith Kline & French Laboratories Ltd. v. Bloch* [1983] 2 All E.R. 72 at 74. See also Neil Guthrie, "A Good Place to Shop: Choice of Forum and the Conflict of Laws" (1995) 27 Ottawa L. Rev. 201.

[377] *Amchem, supra* note 340.

Therefore, the Alberta court will appraise whether the claims and the parties bear substantial connection with Alberta.[378]

In this hypothetical lawsuit, the alleged torts occurred in Sudan, but Talisman is registered in Alberta, transacts business in Canada and has its corporate headquarters in Calgary. Talisman is the parent corporation of Talisman (Greater Nile BV), a Dutch corporation and Talisman has indirect shareholding in Greater Nile Petroleum Operating Company, a Sudanese Corporation [Greater Nile]. Because Talisman is an Alberta corporation, this establishes connection with Alberta, that is, personal jurisdiction by Alberta Courts over Talisman.[379] Nevertheless, the alleged torts occurred in Sudan, which creates connection between Sudan and the Plaintiffs' lawsuit. The issue of *forum non conveniens* then deals with whether the court should exercise jurisdiction over the lawsuit. The cases evaluated in the next section consider the likely approach that an Alberta court may adopt in determining the issue of real and substantial connection.

4.3.2 THE PROBABLE APPLICATION OF *FORUM CONVENIENS*

The courts over the years have taken different approaches in determining the issue of *forum conveniens*. The approach taken by each court involves the exercise of discretion. Nevertheless, the courts generally consider the country or location where the tort occurred, the residence of the parties and witnesses, and the applicable law.

Recherches Internationales Quebec v. Cambior Inc. [*Recherches*][380] provides an extensive appraisal of transnational tort litigation in Canada. *Recherches* differs from *Amchem* because the claimants in *Recherches* suffered damage outside Canada due to an environmental tort. Although our hypothetical case is not on environmental liability, both *Recherches* and our hypothetical case deal with torts committed outside Canada. In addition, *Recherches* applied the leading formulation of the common law rule on *forum non conveniens* as expounded by Sopinka J. in *Amchem*.

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[378] *Ibid.*

[379] Castel, *supra* note 339 at 11.9. See also *Wade Investments Ltd. v. Hat Travel Ltd.* (1980) 21 A.R. 454. See also Rule 6.1(2) of *Alberta Rules of Court*.

[380] 1998 CarswellQue 4511 (Superior Court of Quebec) [*Recherches*].

In *Recherches*, the dam of an effluent treatment plant of a gold mine located in Guyana and owned by Omai Gold Mines Limited [Omai], a subsidiary of Cambior (a Quebec corporation), ruptured in August 1995. Some 2.3 billion litres of liquid containing cyanide, heavy metals and other pollutants spilled into two rivers, one of which is Guyana's main waterway, the Essequibo. A Commission of Inquiry constituted of appointees by the Government of Guyana found that the cause of the discharge of effluent from the treatment plant was the erosion of the core of the dam due to faulty construction of the rockfill from which the dam was built. The Commission also found Omai liable for the disaster because Omai stored cyanide, a noxious substance on its property.

The victims who resided, worked and fished in the environmental disaster zone alleged that they suffered physical and economic damage due to the long-term health risk caused by the spill. The Essequibo was home to numerous species of aquatic life including fish, which comprised a staple of the Guyanese diet. It was also the victims' source of portable water, bathing and cleaning of household items.

To enable 23,000 Guyanese victims sue in Canada, *Recherches Internationales Quebec* was incorporated in Quebec, the province of incorporation of Omai's parent company, Cambior Inc. On February 21, 1997 *Recherches Internationales Quebec* filed in the Quebec Superior Court a Motion for Authorization to Institute Class Action on behalf of the victims. Cambior Inc. raised an objection by way of Declinatory Exception and argued that the court lacked jurisdiction to entertain the class action. Cambior Inc. in the alternative argued that if the court found that it had jurisdiction, the court should decline to exercise jurisdiction because Guyana was a more convenient forum to decide the class action.

Cambior agreed that it was the majority shareholder in Omai but stated that, though it appointed four out of the six directors of Omai, the directors were bound by Guyanese laws to act in the best interest of Omai. Cambior previously employed 10 out of the 1,000 employees of Omai. Cambior argued that the court lacked jurisdiction to issue "an injunction against Cambior, obliging it to restore the contaminated Guyanese environment to its original condition"[381] which was one of the claims made by

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[381] *Ibid.*

Recherches. The court held that it exercised jurisdiction over any defendant resident in Quebec and that it had jurisdiction to entertain the class action proceedings.

It is important to point out that although a court may arrive at the conclusion that it possesses jurisdiction over a claim because the defendant resides or transacts business within the jurisdiction, a Canadian court may still decline jurisdiction on the ground of *forum non conveniens*.

In *Barclays Bank Plc v. Inc. Incorporated,* the Alberta Court of Queen's Bench held that service on the defendant within Alberta confers jurisdiction as of right on the Province of Alberta.[382] The court referred to Castel,[383] and held as follows:

> Common law rules of jurisdiction are procedural in character. The rules as to legal service define the limits of a court's jurisdiction. In all the common law provinces and territories, personal service of the originating process after it has been issued is the foundation of jurisdiction in actions *in personam*. (…This is also called jurisdiction as of right because the right to serve the defendant with process is unqualified. E.g. Alberta Rules of Court Rule 15). In other words, personal jurisdiction over a defendant is based upon the requirement and sufficiency of personal service within the province or territory of the forum. The court of a province or territory has jurisdiction to entertain an action against a defendant who was present in that province or territory at the time of the service of the originating process…

The Alberta Court of Queen's Bench has jurisdiction over a defendant that resides within the province (this includes a company that transacts business within the province and specifically Talisman). However, the position in Alberta is wider in application than that of Quebec,[384] because Alberta courts may exercise jurisdiction over a defendant served within Alberta although the defendant may not be resident in Alberta.[385]

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[382] 242 A.R. 18, 1999 ABQB 110, [2000] A.W.L.D. 363, 78 Alta. L.R. (3d) 101, [2000] 6 W.W.R. 511, 4[illegible] C.P.C. (4th) 314. In that case, the plaintiff bank errantly created deposit certificates in favour of the defendant corporation. The defendant corporation transferred the sum of $310,000 to other bank accounts owned by the 2nd defendant's husband. All transfers took place within two months. Barclay's sued Inc. in Cayman Islands for mistake and unjust enrichment and obtained judgment for $88,000. The plaintiff then brought this action against the defendants in Alberta based on mistake, misstatement (a tort), and unjust enrichment, breach of contract and breach of trust. The court declined jurisdiction because of *forum non conveniens*.

[383] *Ibid.*

[384] *Ibid.* See also Articles 3134 and 3148 of the Quebec Civil Code.

[385] *Barclays Bank Plc v. Inc. Incorporated, supra* note 382.

Once a court establishes that it possesses jurisdiction as of right, it still has to apply the "real and substantial connection" test established in *Amchem*. In *Recherches* the court had to evaluate Article 3135 of the Quebec Civil Code which reads: "Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide."[386] This provision is a restatement of the common law position in *Amchem* and the court cited with approval the comments of Sopinka J. on *forum non conveniens*.

The court evaluated the residence of the parties and held that, even though *Recherches Internationales Quebec* was incorporated in Quebec, the three designated members of the company were resident in Guyana. Therefore, the company's only link with Quebec was for the purpose of litigation. In essence, the plaintiff sought juridical advantage in Quebec through forum shopping. Applying a similar rule to the hypothetical case, the Plaintiffs' presence in Canada is only for the purpose of litigation because the Plaintiffs are not resident in Canada. In essence, Plaintiffs are in Canada because they prefer to sue Talisman in Canada.

It is probable that if the plaintiffs had been the Presbyterian Church of Canada (instead of the Presbyterian Church of Sudan), incorporated in Canada for purposes other than litigation, a Canadian court would exercise jurisdiction over the action. In *Garrett v. Cameco Corp* [*Garrett*], a post *Amchem* lawsuit, employees of Cameco's subsidiary died in a plane crash in Kyrgyzstan.[387] Among the inspectors who investigated and reported on the crash was a representative of the Canadian Bureau of Transportation Security. The defendant and its subsidiaries together with a governmental agency in Kyrgyzstan organized the project that led to the crash. The defendant directed the transaction from its head office in Saskatchewan. Kyrgyzstan had laws that deal with tort claims, although litigation could be long and costly. The plaintiffs, who were administrators of the estate of the deceased, brought this lawsuit in

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[386] This provision is "[t]he well established common law doctrine of *forum non conveniens* [and] was incorporated into the Quebec Civil Code under Article 3135 on January 1, 1994." Per Maughan J.C.S. in *Recherches., supra* note 380.

[387] 1996 CarswellSask 805, 151 Sask. R. 86, [1997] 10 W.W.R. 393 (Q.B. Sask.).

Saskatchewan claiming damages for the alleged negligence of the defendant in the handling of the flight operations leading to the crash.

Plaintiffs alleged that Saskatchewan was the proper forum. The defendant alleged that those with direct knowledge of the crash were outside Canada and that Saskatchewan makes accessibility to evidence of the crash difficult. The Saskatchewan Court of Queen's Bench applied the *forum conveniens* test and held that Saskatchewan was the appropriate forum for the suit. The court observed that the representative of the Canadian Bureau of Transportation Security [CBTS] was in Canada and could be a witness. The court also stated that Canadian employees of the defendant who reside in Kyrgyzstan might testify in the suit. The court exercised jurisdiction because the claim involved Canadians. The court also stated that the CBTS employee who investigated the crash might testify as a witness. The court pointed out that although the project that led to the crash was executed by a joint venture corporation that included Cameco's Kyrgyzstan subsidiaries, evidence showed that Cameco was the directing mind of the firms that made up the joint venture. Evidence also showed that a number of the executives of Cameco's subsidiaries were in Saskatchewan. Cameco also conducted recruitment in Saskatoon for the Kyrgyzstan project.

Conversely, in *Recherches*, the Quebec Superior Court concluded that Guyana, not Quebec, was the natural home forum of the victims of the spill. The court held that Cambior's domicile in Quebec was not a "factor of significant importance" since it was for the purpose of litigation and "the inconvenience to the victims of having to litigate in Quebec is far greater than that of Cambior's Board members and executive officers who would be called upon to testify in Guyana."[388]

The plaintiff listed 40 witnesses: "fifteen are located in Vancouver, ten in the U.S., five in Ottawa, five in Montreal, four in England, and one in Edmonton."[389] The court held that only ten of the witnesses (five in Ottawa and five in Montreal) were compellable by the Quebec court but none was compellable by Guyanese court.[390] The witnesses were to give evidence on engineering, construction and design of the dam, environmental issues and other technical matters. The court stated that the cost of travel of these witnesses to and from Guyana was more than the cost of their traveling to and from Quebec. But the cost of litigation in Quebec made the travel cost to Guyana insignificant. Plaintiffs omitted the list of Guyanese witnesses who would establish the alleged damage. Since the tort was committed in Guyana, the court assumed that these witnesses reside in Guyana. In our hypothetical case, most of the victims reside in Sudan and are not compellable by the Alberta court.

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[388] *Ibid.*
[389] *Ibid.*
[390] *Ibid.*

The court had no difficulties in arriving at Guyana as the location of the elements of proof and the place where the fault occurred.[391] The hypothetical scenario is similar. Most of the witnesses are in Sudan, which is where the alleged torts occurred. This creates a connection with Sudan. These are grounds that Alberta courts are very likely to consider before accepting or declining jurisdiction, under the real and substantial connection test, laid down by Sopinka J. in *Amchem*.

Another obstacle for the plaintiffs is the hesitation with which some courts approach the application of foreign law. In Quebec, "[t]he obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred."[392] Therefore, the applicable law in transnational tort litigation is the law of the country where the fault occurred. Quebec courts have jurisdiction to apply foreign law on issues that border on private international law.[393] Nevertheless, the caution with which judges approach the application of foreign law was obvious in *Recherches*. In *Recherches*, Maughan J.C.S. said that the issue was not whether a Quebec court could apply foreign law but "the issue is whether a Guyanese court is in a better position to do so and, obviously, it is."[394] It is trite to state that a Sudanese court is in a better position to apply Sudanese law than a Canadian court.

Likewise, in Alberta, the applicable law in transnational tort litigation is the law of the place where the fault occurred.[395] In *Barclays Bank Plc v. Inc. Incorporated*,

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[391] *Ibid.*

[392] *Article 3126 of Quebec Civil Code.*

[393] *Recherches, supra* note 380 at para 63.

[394] *Ibid.*

[395] *Tolofson v. Jensen, supra* note 369. La Forest J. held: "From the general principle that a state has exclusive jurisdiction within its own territory and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, that is, the *lex loci delicti*" – (1994), 120 D.L.R. (4th) 289 at 305 (S.C.C.).

Coutu J. said that the proper law is "one of the factors to be considered in the *forum conveniens* test" and held that "foreign law may be difficult to prove or will be more difficult to interpret as an Alberta judge will be applying Cayman Island law."[396]

In *Hermann v. Kilborn Engineering Pacific Ltd.* the British Columbia Supreme Court stated that after a careful consideration of *Amchem* and other cases cited in the lawsuit, a court should consider the following factors while considering *forum conveniens*:[397]

(1) Where each party resides
(2) Where each party carries on business
(3) Where the cause of action arose
(4) Where the loss or damage occurred
(5) Any juridical advantage to the plaintiff in this jurisdiction
(6) Any juridical disadvantage to the defendant in this jurisdiction
(7) Convenience or inconvenience to potential witnesses
(8) Cost of conducting the litigation in this jurisdiction
(9) Applicable substantive law
(10) Difficulty and cost of proving foreign law, if necessary
(11) Whether there are parallel proceedings in any other jurisdiction. ("Forum shopping" is to be discouraged.).

These factors help to determine the appropriate forum but there is no indication of the factors, or combination of factors that should be in favour of a party to determine the appropriate forum. The courts have also not defined "real and substantial connection"[398]. This makes it difficult to conclude on how a court might react to certain factual scenarios. For instance, the Alberta Court of Queen's Bench may apply foreign law, but the court may in exercise of its discretion decline to do so on the ground that Sudanese courts are in a better position to apply Sudanese laws.[399]

It is safe to conclude that the Alberta courts possess personal jurisdiction over Talisman, the defendant, but may decline to exercise jurisdiction because the alleged torts occurred in Sudan. Also, only one of the parties has a connection with Canada, but the alleged torts occurred in Sudan. Witnesses will be required to travel from Sudan to Canada to testify in the lawsuit, if an Alberta court assumes jurisdiction.

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[396] See *Barclays Bank Plc v. Inc. Incorporated, supra* note 382 at paras 33-34.

[397] 1998 CarswellBC 904, 55 B.C.L.R. (3d) 319, [1998] B.C.J. No. 981 (B.C.S.C.).

[398] *Amchem, supra* note 340.

[399] See *Recherches and Amchem* where the courts stated that Guyana and Cayman Island respectively are in a better position to apply their laws.

There is no specific rule on how the Alberta court should weigh the competing factors, but since "real and substantial connection" has not been defined by the courts, the cases evaluated above and the reluctance with which courts approach the application of foreign law definitely point to the court declining jurisdiction.[400] The alleged torts are so tied to Sudan that Canadian courts would probably be least inclined to assume jurisdiction.

The Plaintiffs' best chance of sustaining this lawsuit in Canada is where the Court is of the view that it is in the interest of justice for the case to be heard in Canada.[401] In *Recherches*, Maughan J.C.S. was faced with conflicting evidence on the efficacy of the Guyanese judicial system.[402] The court held that the plaintiff "failed to bring forward any conclusive and objective evidence to substantiate its belief that Guyana is an inadequate forum due to the many deficiencies which plague its system of justice."[403] In *Abdullahi v. Pfizer*, plaintiffs referred to a parallel suit in Nigeria (*Zango v. Pfizer*) where the plaintiff discontinued the suit because the judge handling the suit was removed and another judge to whom the suit was assigned, declined jurisdiction over the suit for personal reasons.[404] A United States Federal Court held that the facts of the case did not establish bias or corruption in the Nigerian legal system and that it is difficult if not impossible to determine what the judge meant by "personal reasons".[405]

Even if the plaintiff argues that the war in Sudan makes it unsuitable for Plaintiffs to commence a lawsuit there, such argument will be unlikely to succeed. This is because Maughan J.C.S. in *Recherches* stated that evidence required to prove the lack of efficacy in the judicial system of another country has to be objective and conclusive.[406] Conclusive evidence sets a high standard and may even require evidence beyond reasonable doubt.

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[400] *Contra Impulsora Turistica de Occidente, S.A. de C.V. v. Transat Tours Canada Inc.* 2007 SCC 20. The Supreme Court of Canada upheld the decision of Dussault J..A. and stated: "proper application of forum non conveniens led to the conclusion that the Quebec Courts had jurisdiction" over a breach of contract which occurred in Mexico. However, the contract had a forum selection clause in favour of Quebec Courts.

[401] *United Oilseed Products Limited v. Royal Bank of Canada, supra* note 351. See also *Antares, supra* note 340.

[402] *Recherches, supra* note 380.

[403] *Ibid.* at para 88.

[404] *Abdullahi v. Pfizer, supra* note 199.

[405] *Ibid.*

Apart from the high standard required to establish an ineffective legal system, it may be pointed out that a rule, which enables a court to appraise the efficiency of the judicial system in another country, is anti-comity. This may be the explanation for "conclusive and objective evidence" required of the plaintiff by the court to substantiate inefficiency in the justice system of Guyana.[407] Such standard sets such a high requirement that it may be difficult for a plaintiff to prove. Maughan J.C.S. also agreed that "it is difficult, if not invidious, to make comparisons between two different systems of justice."[408]

Inefficiency in the justice system probably involves an evaluation of the likelihood of the Plaintiffs to obtain justice in their home forum. The justice system in some developing countries is generally poor and it may take a decade or more for a suit to be decided. Yet, in the same country, one may also find an odd case decided by the courts in five years or less. An argument by a plaintiff's counsel in Canada that the justice system in a particular country is slow will lead to a testimony by the defendant, which shows that some cases are decided within reasonable time in the same country. The judge in such case is likely to prefer the defendant's testimony.

The Alberta Court of Queen's Bench has personal jurisdiction over Talisman, but is likely to stay or strike out the plaintiff's suit.[409] The reasons are first, the Court will consider the difficulty involved in compelling witnesses resident in Sudan to testify in an Alberta court. This involves great cost and issues of extra-territoriality.

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[406] *Recherches, supra* note 380.

[407] *Ibid.*

[408] *Ibid.*

[409] Rule 129 (1) of the Alberta Rules of Court provides, "The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that: (a) it discloses no cause of action or defence, as the case may be, or (b) it is scandalous, frivolous or vexatious, or (c) it may prejudice, embarrass or delay the fair trial of the action, or (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly." Rule 129 applies where a defendant challenges the jurisdiction of the court based on *forum non conveniens*. – *Young Estate v. Trans-Alberta Utilities Corporation* (1997) 55 Alta L.R. (3d) 183 at 189 (C.A.).

Second, in transnational tort litigation, the applicable law is that of the place where the tort occurred. In this case, the torts occurred in Sudan. The Court will likely hold that Sudan is in a better position to apply Sudanese laws than an Alberta court.

Third, it seems unlikely that the Court will attach much importance to the fact that a stay will lead to the loss of juridical advantage to the plaintiffs. Coutu J. has stated, "If more weight were given to the loss of the juridical advantage than to other factors, the *forum conveniens* doctrine would become virtually useless since plaintiffs will ordinarily select that forum which offers them the most favourable advantage."[410] The probable result is that the Alberta Court of Queen's Bench will stay the Plaintiffs' lawsuit on the ground that Sudan is a more appropriate forum unless the Plaintiffs convince the court that the inefficacy in the Sudanese judicial system makes it an inappropriate forum.

4.4 CONCLUSION

The most plausible ground on which the Presbyterian Church may persuade an Alberta court to exercise jurisdiction would be that Sudan's legal system is ineffective. In the *Talisman* case, the Presbyterian Church asserted that they would not get a fair trial in Sudan because "non-Muslims enjoy greatly reduced rights under the system of Islamic law (Sharia) in place."[411] Those reduced rights include "a total lack of legal personality for plaint[illegible]ho practice traditional African religions, and diminished testimonial compete[illegible]or Christians."[412] The United States District Court also observed that the Sudanese government could not conduct alleged ethnic cleansing against the Plaintiffs and be expected to grant them a fair judicial process to remedy those injuries. The District Court concluded that victims of state-sponsored torture could not be expected to sue in the state where the alleged torture occurred. In many instances, merely returning to such country would endanger the victim.

In *Cabiri v. Assasie-Gyimah*, a former Ghanaian Trade Counselor (the plaintiff) filed action under the ATCA against the Ghanaian Deputy Chief of Naval Security (the defendant) for alleged acts of torture committed by the defendant against the plaintiff.[413] Plaintiff served as a trade counsellor for Ghana in New York but was recalled to Ghana in 1986 and investigated for alleged involvement in planning a coup to overthrow the Ghanaian government. Plaintiff was imprisoned at the Bureau of National Investigation for nearly one year without cause or charge. Plaintiff alleged that during the detention, the defendant subjected him to physical and mental abuse and denied plaintiff access to his family members. The United States District Court refused to grant the defendant's motion to dismiss on the ground of *forum non conveniens* because the court found that the plaintiff "would be putting himself in grave danger were he to return to Ghana where he had allegedly been tortured." The District Court noted that "[a] motion to relegate a plaintiff to a foreign forum will be denied if the plaintiff shows that foreign law is inadequate, or that conditions in the foreign forum plainly demonstrate that the plaintiffs are highly unlikely to obtain basic justice therein."[414]

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[410] See *Barclays Bank Plc v. Inc. Incorporated, supra* note 382 at para 58.
[411] 244 F.Supp.2d 289 (S.D.N.Y., 19 March 2003), 155 Oil & Gas Rep. 409.
[412] *Ibid.*

For an Alberta court to assume jurisdiction over the hypothetical lawsuit, the Presbyterian Church must convince the court that an assumption of jurisdiction by a Sudanese court will be an exercise in futility because the Presbyterian Church would not get justice in Sudan. The task is not easy but since the Plaintiffs convinced the United States District Court they might also convince an Alberta court. Even if the Plaintiffs convince the Alberta courts to assume jurisdiction, the merit of Plaintiffs' claim is weak as argued in Chapter Three.

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[413] 921 F.Supp. 1189, 1191 (S.D.N.Y. 1996).
[414] *Ibid.*

CHAPTER FIVE

RECOMMENDATION AND CONCLUSION

5.1 RECOMMENDATION

Due to the lack of international regulation of corporate abuses, countries generally make laws to regulate transnational corporations operating within their jurisdiction. For instance, some countries permit an individual to sue a corporation for human rights violations that occurred extraterritorially provided the claimant establishes a real and substantial connection between the alleged wrong and the forum chosen for litigation. Real and substantial connection to the forum chosen for litigation is a means of determining *forum conveniens*. Canada is one of the countries that apply the *forum conveniens* rule.[415]

Another form of extraterritorial jurisdiction is the type created by a specific statute, which confers on aliens the right to sue in another jurisdiction for violations of international law. This form of extraterritorial jurisdiction invests in local courts the power to exercise jurisdiction over claims by aliens. Among the countries that have taken this route are United States and Belgium.[416] An evaluation of ATCA cases in

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[415] See Chapter Four of this thesis.

[416] See Barnali Choudhury, "Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses" (2005) 26 Nw. J. Int'l L. & Bus. 43 [Choudhury]. Belgium introduced in 1993, the Act Concerning the Punishment of Grave Breaches of International Humanitarian law [the Belgian Act]. For an English translation of the Act, see Stefaan Smis & Kim van der Borght, "Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law" (1999) 38 I.L.M. 918. The Belgian Act covers breaches of international humanitarian law such as crimes against humanity, genocide and war crimes. It recognizes the "universal jurisdiction" of Belgian courts to adjudicate over the provisions of the Belgian Act irrespective of the nationality of the claimant or the country where the tort was committed. The Act requires no connection between Belgium and the alleged tort. Belgian authorities relied on the Belgian Act to investigate Totalfinaelf, a French oil corporation for possible human rights violations committed in Myanmar - AFP, "Belgium Reopens Myanmar Humanity Crimes Probe Against Oil Giant Total" *Agence France-Presse* (2 October 2007) online: AFP <http://afp.google.com/article/ALeqM5g84fzhRA8Y6IvW-gmt7YmonfEBKg>. In March 2008, Belgian prosecutors declared the case closed after an amendment to the Belgian Act, which stripped the courts of universal jurisdiction. President Bush and Vice President Cheney were also charged under the Belgian Act for alleged war crimes committed during the Persian Gulf War in 1991 - Richard Bernstein, "Belgium Rethinks its Prosecutorial Zeal" *The New York Times* (1 April 2003) online: The New York Times<http://query.nytimes.com/gst/fullpage.html?res=9E02EEDA1339F932A35757C0A9659C8B63&sec=&spon=&pagewanted=all>. Due to pressure from the United States, Belgium amended the Belgian Act and limited the jurisdiction of Belgian courts to citizens and residents. This eliminated the universal jurisdiction of Belgian courts over aliens for torts committed extraterritorially.

Chapter Two shows that there is as yet no successful suit in the United States against a transnational corporation for transnational tort or human rights violations.

The effort of the United States federal courts as shown by the cases discussed earlier together with the *OECD Guidelines* shows that there is at least a level of consensus that there should be prescribed guidelines for transnational enterprises. Member countries of the OECD are mostly developed countries and generally the home state of numerous transnational corporations, including oil companies. The fact that they adopted the *OECD Guidelines* shows, at least, some level of commitment towards tackling corporate human rights abuses. Apparently, there is no agreement on whether legal regulation is necessary and if so, the extent of such regulation.

The opposition for the transition of the Norms on the *Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights* [the Norm] to a treaty by US Council for International Business [USCIB], the Confederation of British Industry and the International Chamber of Commerce [ICC] demonstrates this.[417] For instance, the ICC with hundreds of multinationals as its members asserted that voluntary industry initiatives are sufficient to protect human rights and the USCIB Vice President, Mr. Timothy Deal, maintained that the Norm amounted to a privatization of the enforcement of human rights laws.[418] In his opinion, a move to make private business enterprises liable for human rights violations is a revolutionary step.[419] It is not clear whether these opinions reflect the position of some states.

The consent and firm commitment of developed states are essential for any proposed legal regulation of transnational corporations. This is because they are the home state of most transnational corporations and they possess better legal and administrative frameworks to accomplish the task of legal regulation.

Presently, there are norms that regulate the conduct of transnational corporations on a voluntary basis. Although this work does not discount the numerous benefits of legal regulation, it is urged that states should exercise caution to avoid the creation of ineffective laws regulating transnational corporations. Cases discussed in Chapter Two involving oil companies show that alleged human rights violations by transnational oil corporations may involve complicity with the host government or government officials or agencies. While it is desirable to regulate complicity, states should carefully delineate the scope of the regulation. The *Global Compact* defined complicity as encompassing direct, beneficial and silent complicity.[420] Direct complicity occurs where a company knowingly assists in human rights violations, while beneficial complicity arises when a company profits directly from human rights violation and silent complicity is failure by a company to raise systematic or continuous human rights violations.[421]

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[417] See CEO Info Brief 2004, "Shell Leads International Business Campaign Against UN Human Rights Norms online: <http://www.corporateeurope.org/norms.html>.
[418] *Ibid* at 1 and 3.
[419] *Ibid.*

While it is necessary to control direct complicity, beneficial and silent complicity are so abstract that legal control may become ineffective and their definition may be so wide as to lead to unworkable or ineffective legal control.[422] The international community should strive to ensure that the search for legal regulation does not result in weak or unenforceable laws.[423] Beneficial and silent complicity may work injustice in some situations. For instance, if demonstrators in Sudan threatened to disrupt the oil activities of Greater Nile and the company called Sudanese police to maintain law and order, Greater Nile may be responsible if the police overreacted and injured some of the demonstrators. The basis for liability might be that Greater Nile benefited from the conduct of the Sudanese police. Where there is apprehended breach of the law through violent demonstration, a corporation should not be blamed for turning to the police for help.

An acceptable framework for the regulation of transnational corporations is desirable and beneficial. The host state is the primary violator of human rights in many cases of alleged conspiracy between an oil corporation and a host state.[424] Therefore, it is unlikely that such host states will be interested in any meaningful regulation or deterrent measures against transnational corporations for human rights abuses.

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[420] See Principle Two of the Global Compact online: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

[421] *Ibid.*

[422] See Sarah Percy, *supra* note 130. She argued that the definitions of mercenaries in Article 47 of Protocol I Additional to the Geneva Conventions 1977 and the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries 1989 were so wide that every mercenary excluded himself from the definition and the law became so weak that it has become ineffective.

[423] Weak laws refer to ineffective laws. See Sarah Percy, *ibid.*

[424] Michael Anderson, "Transnational Corporations and Environmental Damage: Is Tort Law the Answer? (2002) 41 Washburn L.J. 399 at 418.

When the international community agrees on a treaty regulating human rights abuses by transnational corporations, Canada can rely on the existence of such legal framework to control its transnational corporations. Canada can adopt the treaty and take steps to incorporate it into Canadian laws. The treaty will serve as basis for the regulation of Canadian transnational corporations and may enable our hypothetical plaintiff to sue in Canada. Canada may rely on the treaty to enact a similar legislation to ATCA, which permits aliens to sue in Canada for human rights violations committed by Canadian transnational corporations.

The benefit of ATCA lies in the fact that an alien may rely on it to obtain redress for torts committed in another country. This provides extraterritorial jurisdiction within the United States, over torts committed outside the United States. Although this is of benefit to victims of tortious acts committed outside the United States, it presents a problem as well.

In the United States, just as in some other common law countries, the basis for exercise of jurisdiction in civil cases is the service of a writ on a defendant present within the country, "even if the presence of the defendant is purely temporary or coincidental."[425] This implies that once a defendant is served with court process by an alien who relied on ATCA to sue in the United States, a court of competent jurisdiction can technically assume jurisdiction over the lawsuit. This presents a problem in some cases because the excessive assertion of jurisdiction, even in civil cases, could lead to international protest by other states and may violate the nationality principle under international law.[426]

In *Presbyterian Church of Sudan v. Talisman Energy Inc.* [*Talisman*] the Canadian government protested the exercise of jurisdiction by the United States District

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[425] See Shaw, *supra* note 25 at 578.

[426] Ian Brownlie, *Principles of Public International Law*, 6th ed., (Oxford: Oxford University Press, 2003) at 298 [Brownlie]. Nationality principle is the right of a state to regulate the conduct of its nationals irrespective of where the alleged conduct occurred. See Jonathan Horlick, "US and Canadian Civil Actions Alleging Human Rights Violations Abroad by Oil and Companies" (Jasper: CPLF Jasper Research Seminar, 2007) at 9 [Horlick].

Court over Talisman Inc., a Canadian corporation.[427] One of the grounds for objection by the Canadian government was that the United States District Court assumed jurisdiction over a Canadian corporation in relation to alleged torts that occurred outside the United States. In *Talisman,* the plaintiffs were former residents of Sudan. They claimed that Greater Nile Petroleum Operating Company [Greater Nile] grossly violated their rights through acts of genocide, enslavement, torture, rape, and other human rights violations committed by the government of Sudan.[428] They also alleged that Talisman aided and abetted the government of Sudan to commit these human rights violations by acting through its subsidiary to protect Talisman's interest in Sudanese oil.[429]

Talisman owns a subsidiary, Fortuna Energy Inc., in the United States. Other than through its subsidiary, Talisman's only link with the United States is that the corporation is listed on the New York Stock Exchange.[430] These facts show that Talisman's connection with the United States was minimal.

A group of eminent Canadian parliamentarians, professors and civil society organizations filed an *Amici* Brief in the *Talisman* case in opposition to the Canadian government's protest and argued that the exercise of jurisdiction by the United States courts over Talisman was consistent with public international law.[431] International law permits universal jurisdiction over heinous crimes such as genocide, war crimes and crimes against humanity. They argued that "no principle of international law precludes civil jurisdiction over these wrongs – and indeed, public international law is more permissive of extraterritorial jurisdiction in civil than in criminal matters."[432] The Canadian government was not "seeking to protect a superior jurisdictional interest either manifested in actual litigation in Canada (even assuming that a lawsuit could be brought there successfully) or concerning conduct within Canada" over which Canada might be expected to claim territorial sovereignty.[433]

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[427] 2005 WL 2082846 (S.D.N.Y.).

[428] *Ibid.*.

[429] *Ibid.*

[430] See Talisman Energy online: <http://www.talisman-energy.com>.

[431] *Presbyterian Church of Sudan v. Talisman Energy Inc.*, Brief *Amici Curiae* of Canadian Parliamentarians, Professors of Law and Civil Society Organizations and Experts, 07-0016-CV (S.D.N.Y.).

[432] *Ibid.*

The arguments are based on the peculiar facts of the *Talisman* case. Arguably, the Presbyterian Church might have no cause of action in Canada. Genocide and war crimes create universal jurisdiction. None of the parties filed any lawsuit in Canada and the eminent Canadians argued that there was "no serious prospect of a fair trial in Sudan."[434] If the United States courts declined jurisdiction, the Presbyterian Church might be denied access to the courts. This would work obvious injustice. This provides justification for the assumption of jurisdiction by the United States District Court.[435]

The situation would be different if one of the parties also sued in Canada or Sudan. In that event, it may be against comity for the United States courts to assert jurisdiction. Canada might claim jurisdiction based on the nationality principle. Sudan may claim territorial jurisdiction as the locus of the alleged tort. Any claim of jurisdiction by the United States courts will be limited to universal jurisdiction, which every country possesses, including Sudan and Canada.

Limiting jurisdiction of Canadian courts to only Canadian corporations will be in accordance with the nationality principle under international law. The nationality principle recognizes the right of a state to regulate the actions of its nationals, irrespective of where the alleged conduct occurred.[436] Nationality creates sovereignty and an aspect of the nationality principle is the right of a state to act extraterritorially over its nationals.[437] This creates a legal basis for a state to regulate conduct that occurred outside the territory of the state.[438]

Possibly, a Canadian statute modeled after ATCA may relax the rigid *forum conveniens* test where an alien sues under the proposed statute. ATCA contemplates domestic lawsuits for torts committed in other countries. If Canada enacts a statute modeled after ATCA with the purpose of authorizing lawsuits over transnational torts, this may influence Canadian courts to develop and apply a less rigid formulation of

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[433] *Ibid.*
[434] *Ibid.*
[435] For a criticism of the United States exercise of jurisdiction over Talisman, see Horlick, *supra* note 426.
[436] Horlick, *supra* note 426 at 9. See also Shaw, *supra* note 25 at 584.
[437] Brownlie, *supra* note 426.
[438] *Ibid.*

forum conveniens test where an alien sues under the proposed statute. An application of the current test in Canada on *forum conveniens* will defeat the purpose of the proposed statute.

The United States federal courts probably realized that a rigid application of the *forum conveniens* test to ATCA would defeat its application to transnational torts. The District Court cautioned in *Presbyterian Church of Sudan v. Talisman Inc.* that the test for *forum conveniens* under the ATCA is not the usual "matter of which side has the weightier argument. Instead, the burden is on the defendant to show that the factors tilt "strongly" in favor of trial in a foreign forum."[439] This test clearly differs from assessing the side that has the "weightier argument", as reflected in the Canadian real and substantial connection test. The Canadian test assesses the totality of factors in favour of each party and determines the party in favour of whom the scale tilts. Conversely, the United States ATCA model places the burden on the defendant to establish that the totality of the factors tilts "strongly" in favour of trial in a foreign jurisdiction. The word "strongly" places a higher burden on the defendant and leads to the assumption of jurisdiction by United States courts in cases where Canadian courts would likely decline jurisdiction.

It is suggested that Canada might consider applying the United States approach because its rejection implies that the proposed statute adds nothing to the Canadian jurisprudence if the courts insist on an application of the current test on *forum conveniens*. If the legislature were to pass a statute modeled after ATCA, any insistence by the courts on an application of the current *forum conveniens* test would defeat the intention of the legislature and the purpose of the statute.

Although the suit of our hypothetical plaintiff is unlikely to succeed in Canada, the recognition of the right of aliens to sue in Canadian courts over transnational torts involving corporate human rights violations will offer hope to victims of human rights violations by Canadian corporations. It will provide remedies for victims of alleged torts committed directly by corporations such as the *Pfizer* case.

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[439] *Supra* note 176. See also note 264.

5.2 CONCLUSION

This thesis explored the liability of transnational corporations for human rights violations. It reviewed the international liability of corporations for human rights violations and concluded that international law is yet to develop laws to regulate the international liability of corporations for human rights violations.

It then focused on municipal laws of the United States and Canada to assess the extraterritorial jurisdiction of states over transnational torts and evaluated the jurisdiction of United States federal courts over aliens based on the ATCA. The ATCA showed that there is no successful suit against a transnational corporation for human rights violations in the United States.

The *Talisman* case was used to assess the liability of parent corporations for torts committed by their subsidiaries. It showed that Talisman would likely not be liable for the torts of its subsidiary under the circumstances alleged by the Presbyterian Church in the *Talisman* case. It appraised the Canadian position on conspiracy to commit human rights violations and concluded that although the courts have recognized the tort of conspiracy, Canadian courts have not recognized conspiracy to commit human rights violations but encouraging statements by the judiciary show that the door is not closed on the categories of recognized tort of conspiracy.

This thesis also evaluated the discretion of Canadian courts to decline jurisdiction over transnational torts on the ground of *forum non conveniens*. It analyzed such discretion using the hypothetical Talisman case and concluded that although Canadian courts have personal jurisdiction over Talisman, the courts may decline jurisdiction due to *forum non conveniens*.

It then recommended that international law should carefully craft any laws regulating transnational human rights and the scope should be carefully delineated to avoid ineffective legal control. Also, Canada may adopt the treaty and incorporate it into its laws. This could form the basis for the assumption of jurisdiction by Canadian courts over transnational human rights cases involving Canadian corporations.

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